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Supreme Court of the United States

OCTOBER TERM, 1937

No. 322

WESTERN LIVE STOCK, A PARTNERSHIP COMPOSED OF FRAZIER BIGGS AND D. F. BIGGS, APPELLANT,

vs.

BUREAU OF REVENUE AND JOHN A. BINGAMAN, COMMISSIONER OF REVENUE

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO

FILED AUGUST 16, 1937.

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[fol. 1] **IN DISTRICT COURT OF SANTA FE COUNTY**

WESTERN LIVE STOCK, a Partnership Composed of Frazier Biggs and D. F. Biggs, Plaintiff, Appellee

vs.

BUREAU OF REVENUE and JOHN A. BINGAMAN, Commisioner of Revenue, Defendants, Appellants

AMENDED COMPLAINT—Filed November 14, 1935

Plaintiff states:

I. That plaintiff, Western Live Stock, is a partnership composed of Frasier Biggs and D. F. Biggs, having its principal and only office and place of business at 126 South Third [fol. 2] Street in Albuquerque, Bernalillo County, New Mexico; that Frasier Biggs is a resident of Albuquerque, Bernalillo County, New Mexico, and D. F. Biggs is a resident of Chicago, Cook County, Illinois.

II. That the defendant, Bureau of Revenue, is created by Chapter 9, Laws of 1935, and vested and charged with all powers and duties conferred and imposed upon the State Tax Commission by the Emergency School Tax Act of 1934, being Chapter 7 of the Laws of 1934, Special Session; that John A. Bingaman is the duly appointed, qualified and acting Commissioner of Revenue provided for by Chapter 9.

III. That plaintiff is now, and for some years last past has been, the owner and publisher of a livestock magazine, issued monthly, and known and designated as "Western Live Stock"; that said magazine is wholly prepared, edited and published in Albuquerque, Bernalillo County, New Mexico, and that plaintiff's only office and place of business is in said city, county and state; that said magazine has a general circulation and distribution throughout New Mexico and other states comprising the United States of America; that said magazines are distributed through the United States mails from Albuquerque, New Mexico, to its paid subscribers located and residing in New Mexico and in other states of the Union.

IV. That said magazine, "Western Live Stock," receives and publishes under contract and for hire advertisements

to be published in its monthly issues, including advertisements by advertisers residing and located in states other than New Mexico, who advertise products, manufactured elsewhere than in New Mexico, to be sold, shipped and transported direct from them to the customer in the original packages as when manufactured; that said foreign advertisements (by this term referring to advertisements of the [fol. 3] type last above described) are obtained by plaintiff both through personal solicitation on the part of plaintiff, its officers and agents, either through the mails or by personal calls on said foreign advertisers in states other than New Mexico, and through advertising agencies located in states other than New Mexico; that the contractual relations between plaintiff and its foreign advertisers (effected either directly by plaintiff or through advertising agencies) are entered into in foreign states, and all advertising cuts, mats, material, information, intelligence and copy are sent to plaintiff by said foreign advertisers residing outside of New Mexico; that payment for said advertising is sent to plaintiff from foreign states; that said contracts for advertising between plaintiff and foreign advertisers and the actual insertion of advertisements in plaintiff's magazine by foreign advertisers are brought about in order to promote and aid the sale, in original packages, and in states other than where manufactured and produced and stored, of products and merchandise handled by said foreign advertisers; that said contracts and advertisements are adopted as a direct means and aid in advertising and giving information on products and merchandise in interstate commerce; that as a direct and immediate result of said advertising in plaintiff's magazine by foreign advertisers, there develops a commerce between them and residents of New Mexico and other states in the advertised products and merchandise, and there is placed in motion the interstate shipment of goods, sold in original packages and manufactured and stored in states other than to which the said goods are ultimately destined; that accordingly, said contracts between plaintiff and its foreign advertisers, and the advertisements themselves, are transactions in interstate commerce, and the same become instrumentalities of interstate commerce.

[fol. 4] V. That chapter 7 of the Session Laws of New Mexico of 1934, commonly known as the sales tax law, hereinabove referred to, provides for the levy of what is called

an "excise" or "privilege" tax. Section 201, subsection I, provides for the application of said tax to certain businesses as follows:

"I. At an amount equal to 2% of the gross receipts of any person engaging or continuing in any of the following businesses * * * publication of newspapers and magazines (but the gross receipts of the business of publishing newspapers or magazines shall include only the amounts received for the sale of advertising space) * * *"

that for the period embracing May, 1934, to December, 1934, inclusive, and March, 1935, to June, 1935, inclusive, plaintiff's gross receipts from foreign advertisers (of the class described in Paragraph IV hereof) for the sale of advertising space in its said magazine, amounted to $1481.05.

That acting under the purported authority contained in said Chapter 7 of the Session Laws of 1934, The State Tax Commission and the above named defendants, have attempted to levy an assessment against and tax plaintiff on said gross receipts of $1481.05.

That on or about August 16, 1935, defendants made demand on plaintiff for a sum equal to 2% of said $1481.05, to wit, $68.20, and for the additional sums of $6.82 as penalty and $5.25 as interest, or a total of $80.27, and threatened that unless said sum was paid within five days, that the issuing of a warrant to the Sheriff of Bernalillo County, New Mexico, would follow.

That plaintiff, while denying the legality of said tax of $80.27, did on September 10, 1935, pay the sum of $80.27 under protest, reserving all rights to recover the same as provided by law; that plaintiff, in compliance with law, did on September 10, 1935, file a written protest duly veri- [fol. 5] fied under oath, challenging the legality of said tax, setting forth its objections thereto, and notifying the State Tax Commission of New Mexico that suit would be brought to recover said $80.27 so paid under protest; that a copy of said written protest is attached hereto, marked Exhibit "A" and made a part hereof.

VI. That said tax penalties and interest, amounting to $80.27, levied on the gross receipts of plaintiff's foreign advertising for the aforesaid period, and those sections of Chapter 7, laws of 1934 (particularly Section 201) pur-

porting to authorize the same, are illegal, void, unconstitutional, and unenforceable, for the following reasons:

(1) The same create a direct and substantial burden upon interstate commerce, in direct conflict with Article I, Section 8, Paragraph 3, of the Constitution of the United States, giving to the Congress of the United States power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes."

That said 2% tax on gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or not; that in many instances this 2% sales tax will spell the difference between profit and loss, its ultimate effect will be to impede and discourage the conduct of this type of commerce.

(2) The same are prohibited by Section 202 of said Chapter 7 of the Laws of 1934, which provides in part:

"None of the taxes levied by this act shall be construed to apply to transaction in interstate or foreign commerce * * * which under the Constitution of the United States, the State of New Mexico is prohibited from taxing; nor to any businesses or transactions exempted from taxation [fol. 6] under the Constitution of the United States of the Constitution of the State of New Mexico;"

In explanation of both of the foregoing grounds, plaintiff contends that the publication of a newspaper which circulates in different states of the Union constitutes interstate commerce; furthermore that the sale in original packages of products other than in the states where originally manufactured or stored likewise constitutes interstate commerce; and that the advertising of such interstate commerce business, in order to promote and aid the same, and put in motion the interstate shipment of goods, makes such advertising, and all phases thereof, an indispensible instrumentality and an essential and fundamental part of interstate commerce; that such advertisements and contracts embracing the same themselves constitute interstate commerce and transactions in interstate commerce;

(3) Said tax would appear to be unlawful inasmuch as the imposition thereof creates a condition directly contrary to the expresed purpose and intent of the sales tax law. (See Section 204, Chapter 7, Laws of New Mexico of 1934).

Plaintiff, and publishers in a like position, have found

it impossible to pass the 2% tax on to the ultimate consumers of their products and service—viz.—the foreign advertisers. Being non-residents of New Mexico, they can in no way be benefited by the purposes of the tax, and the fundamental rule of taxation—that those who pay must in some way be benefited—is violated.

VII. That plaintiff is entitled to judgment against the defendants for the recovery of said sum of $80.27, paid under protest on September 10, 1935, as aforesaid, together with interest thereon at the rate of 6% per annum from September 10, 1935, until paid.

[fol. 7] Wherefore, plaintiff prays for judgment against the defendants, pursuant to Section 314, Chapter 7, Laws of 1934, and Section 1, Chapter 9, Laws of 1935, for the sum of $80.27, together with interest thereon at the rate of 6% per annum from September 10, 1935, until paid and for its costs herein expended, and for such other relief as may appear proper.

(Signed) D. A. Macpherson, Jr., Attorney for Plaintiff, 810 First National Bank Bldg., Albuquerque, New Mexico.

The foregoing Amended Complaint was duly verified by D. A. Macpherson, Jr., as attorney, on the 14th day of November, A. D., 1935, before Herbert Gerhart, Clerk, Supreme Court of New Mexico.

EXHIBIT "A" TO AMENDED COMPLAINT

Protest

State Tax Commission, Santa Fe, New Mexico.

GENTLEMEN:

The undersigned hands you herewith the sum of $80.27 in payment of taxes attempted to be levied by the terms of Chapter 7 of the Special Session Laws of 1934. This tax is being paid under protest under and pursuant to Section 314 of said Chapter.

We base our grounds of protest and question the legality of the tax so far as it is levied against foreign advertising sold and published in our paper upon the following:

Section 202 of the Act provides that it shall not apply to any transaction in interstate or foreign commerce, plainly

intending not to run counter to Article I, Section 8 of the Constitution of the United States of America which gives Congress the sole power "to regulate commerce with foreign nations and among the several states and with the Indian Tribes."

The contractual relations between the undersigned and the foreign advertisers were entered into in a foreign state and the advertised products and merchandise shipped inter-[fol 8] state. Advertising so contracted for in a state outside the confines of New Mexico is preliminary and incident to the hoped for sale of the goods advertised to be shipped interstate.

The enforcement of the Act therefore as against such foreign advertising is contrary not only to the Constitution of the United States, quoted supra, but to the plain provisions of the taxing act itself, and you are further notified that if the monies tendered are accepted and held by you, suit will be instituted to recover the same.

(Signed) Western Live Stock, by Frasier Biggs.

State of New Mexico,
County of Bernalillo, ss:

Frasier Biggs, being first duly sworn according to law, deposes and says: That he is the publisher of Western Live Stock, the company signing the above protest; that he has read the foregoing Protest, knows the contents thereof and that the same is true of his own knowledge.

(Signed) Frasier Biggs.

Subscribed and sworn to before me this 9th day of September, 1935. (Signed) Margaret Hartzell, Notary Public. My commission expires October 2, 1935. (Seal.)

In District Court of Santa Fe County

Demurrer—Filed November 27, 1935

Come now the defendants in the above entitled cause of action and demur to the complaint for the reason that same does not state facts sufficient to constitute a cause of action in that;

I. The complaint shows upon its face that the transactions described in the complaint between the plaintiff and

various advertisers in foreign states constitute mere contracts between residents of different states, and therefore, [fol. 9] do not constitute transactions in interstate commerce.

II. The complaint shows upon its face that transactions described in the complaint constitute mere contracts between the plaintiff and the various advertisers and that such contracts are merely incident to speculative transactions in interstate commerce.

III. Complaint shows upon its face that there exists in the minds of the advertisers a mere wish or desire that movements in interstate commerce will arise by virtue of such advertisements and that such advertisements are, therefore, too remote to constitute instrumentalities of interstate commerce.

IV. The complaint shows upon its face that even though the transactions described in the complaint constitute transactions in interstate commerce, nevertheless the complaint fails to show why such transactions would not be taxable inasmuch as section 202 of Chapter 7 of the Special Session Laws of 1934 only exempts such taxes when under the Constitution of the United States or the State of New Mexico such transactions could not be taxed and the complaint fails to show wherein such transactions as mere incidents of interstate commerce would not be taxable under the Constitution of the United States and of the State of New Mexico.

Frank H. Patton, Attorney General, Attorney for Defendants, Santa Fe, New Mexico.

IN DISTRICT COURT OF SANTA FE COUNTY

PETITION TO AMEND THE AMENDED COMPLAINT BY INTERLINEATION—Filed February 15, 1936

Comes now the above named plaintiff by its attorney, D. A. Macpherson, Jr., and moves the court to allow the [fol. 10] amended complaint on file herein to be amended by interlineation in the following particulars, to-wit:

That in Paragraph (IV) of said amended complaint, in the nineteenth (19th) line, following the words "foreign advertisers residing outside of New Mexico" there be inserted the following additional allegation: "that as regards

the newspaper advertising business done by plaintiff for advertisers located outside of New Mexico, the contracts negotiated and entered into with such advertisers provide for and contemplate a continuous passage of contracts, correspondence, plat-s, cuts, mats, engravings, copy, intelligence and information from the advertiser across state lines to plaintiff, the printing of such advertising in its journal, and its circulation and distribution in such journals by means of motor trucks, railroads, express and the United States mails throughout the states of the United States, all constituting one inseparable interstate business relationship, and that only after the full and faithful completion and performance of each of such necessary component and related steps is plaintiff entitled to secure payment for such interstate business and will payment of the consideration therefor pass from the out-of-state advertisers to plaintiff, and only until then can plaintiff be said to have completed and performed its service of newspaper advertising in accordance with its contracts for such advertising. Plaintiff further alleges that it cannot segregate or discontinue its interstate and foreign advertising and business from its intrastate and local advertising and business and that to discontinue its interstate and foreign advertising would force plaintiff to give up its business and close."

Plaintiff further moves that Paragraph VI, Subsection (1), be amended by there being added at the end of said section and just before Subsection (2), the following lan-
[fol. 11] guage: "Plaintiff specifically alleges that a two per cent (2%) tax on the gross receipts of a portion of its advertising in which the net profit without the tax is small has resulted in said advertising being printed by plaintiff at a loss."

D. A. Macpherson, Jr., Attorney for Plaintiff, 810 First National Bank Bldg., Albuquerque, New Mexico.

IN DISTRICT COURT OF SANTA FE COUNTY

ORDER PERMITTING AMENDMENTS TO AMEND COMPLAINT BY INTERLINEATION—Filed February 15, 1936

The court considering the petition of plaintiff to amend its amended complaint herein by interlineation, and finding that said petition should be granted,

Now, Therefore, it is Hereby Ordered that said petition be granted and said amended complaint considered further amended by interlineation in the particulars set forth in said petition.

M. A. Otero, Jr., District Judge.

IN DISTRICT COURT OF SANTA FE COUNTY

FINAL JUDGMENT, ORDER OVERRULING DEMURRER AND ALLOWING APPEAL—Filed February 20, 1936

This cause coming on to be heard upon the Demurrer filed by the above named defendants, plaintiff appearing by its attorney, D. A. Macpherson, Jr., and defendants appearing by Honorable Frank H. Patton, Attorney General for the State of New Mexico, plaintiff having prior thereto filed its Petition to Amend the Amended Complaint by Interlineation, and the court having signed an order permitting said [fols. 12-15] amendments set forth therein, and the court having heard the arguments of attorneys for plaintiff and defendants and being fully advised, finds:

That said Amended Complaint of plaintiff sets forth a good cause of action and that the foreign advertising, as therein described is interstate commerce and constitutes transactions in interstate commerce; that the tax on said foreign advertising constitutes a burden on interstate commerce and is illegal and void; and that said Demurrer should be overruled.

Wherefore, it is Ordered, Adjudged and Decreed that the Demurrer on file herein be and the same is hereby overruled, to all of which the defendants, by their attorney, Honorable Frank H. Patton, Attorney General for the State of New Mexico, duly objects and excepts and said attorney for defendants announcing that he refuses to plead further and stands on his Demurrer,

It is Ordered and Adjudged that final judgment issue, and it is therefore further ordered, adjudged and decreed that plaintiff recover in accordance with the prayer of the complaint from defendant the sum of Eighty and 27/100 Dollars ($80.27), together with interest thereon at the rate of six per cent (6%) per annum from September 1, 1935, until paid.

Whereupon defendants praying for an appeal to the

Supreme Court of New Mexico, it is Ordered and Adjudged that said appeal be and the same is hereby granted.

It is Further Ordered and Adjudged that the allowance of said appeal act as a stay of execution.

M. A. Otero, Jr., District Judge.

Approved: Frank H. Patton, Attorney General, Attorney for Defendants.

[fol. 16] IN SUPREME COURT OF NEW MEXICO

Cause No. 4210

OPINION—Filed February 22, 1937

The plaintiffs (appellees) sued in the district court of Santa Fe County to recover taxes in the sum of $80.27, paid under protest, imposed by the provisions of Chapter 7 of N. M. Session Laws of 1934 (Special Session) based upon the receipts arising from certain advertising. Section 314 of the Act extends authority to seek recovery by suit of taxes so paid on conditions therein named.

Judgment was rendered against defendants following their refusal to plead further upon entry of the trial court's order overruling a demurrer interposed by them to plaintiffs' amended complaint, hereinafter referred to as the complaint. They prosecute this appeal to secure a correction of the judgment claimed to be erroneous.

The essential facts, as disclosed by the complaint, are these. The plaintiffs are partners operating under the firm name of Western Live Stock. Their business is the publication of a trade journal or magazine at Albuquerque, New Mexico, known as "Western Live Stock." It has a general circulation in New Mexico and other states. It is circulated by means of the United States mails, motor trucks, railroads and express.

One of plaintiffs' sources of revenue is, of course, advertising. The magazine receives and publishes, under contracts, advertisements of products which are manufactured elsewhere than in New Mexico, such products to be sold, shipped and transported from the manufacturer to the customer. These foreign advertisements are obtained by plaintiff both through personal solicitation and through what are known as advertising agencies, located in states

other than New Mexico. Some of these advertising con-
[fol. 17] tracts are made between plaintiffs and the manufacturer, located in a foreign state, while others, as stated, are made between the plaintiffs and an advertising agency, such advertising agency having a different and a separate contract with the manufacturer and in such cases all dealings in connection therewith are between the plaintiffs and the agency.

In the preparation of the advertisements for insertion in the plaintiffs' magazine, certain advertising cuts, mats, material, information, intelligence and copy are sent to plaintiffs by said foreign advertisers, and plaintiffs receive compensation pursuant to the contract to carry the advertising from such foreign advertisers, and the receipts arising from such advertising contracts form the measure of the tax imposed in its application to plaintiffs.

This advertising is naturally designed to promote the sale of the advertised products. The advertising contracts so made with residents of other states require an interchange of correspondence between the advertiser and plaintiffs, contemplate the forwarding prior to publication of plat-s, cuts, mats, engravings, copy and information from outside the state to plaintiffs within the state, as aforesaid, and the circulation and distribution of such magazines to subscribers and purchasers in New Mexico and other states.

The challenge to the act laid as a basis of recovery is briefly that the act, in the respect sought to be enforced against plaintiffs, violates section 8 of Article I of the Constitution of the United States, known as the "Commerce Clause", by placing an unconstitutional burden on interstate commerce. The gist of the demurrer, likewise in brief, is that under the facts pleaded it does not.
[fol. 18] The tax assailed is imposed by section 201 of said Chapter 7, Special Session Laws of 1934, reading as follows:

"There is hereby levied, and shall be collected by the Tax Commission, privilege taxes, measured by the amount or volume of business done, against the persons, on account of their business activities, engaging, or continuing, within the State of New Mexico, in any business as herein defined, and in the amounts determined by the application of rates against gross receipts, as follows:

As applicable to plaintiffs the measure of the tax is prescribed by sub-paragraph I of section 201, reading:

"At an amount equal to two per cent of the gross receipts of any person engaging or continuing in any of the following businesses: * * * publication of newspapers and magazines (but the gross receipts of the business of publishing newspapers or magazines shall include only the amounts received for the sale of advertising space), * * *."

The plaintiffs chiefly rest their argument supporting correctness of the trial court's ruling on the demurrer on certain state and federal cases, to-wit, Post Printing & Publishing Co. v. Brewster (U. S. D. C.) 246 Fed. 321; State v. Salt Lake Tribune Pub. Co., 68 Utah 187, 249 P. 474; Little v. Smith, 124 Kan. 237, 257 P. 959; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678; Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co., 293 U. S. 268, 79 L. ed. 356; and the case of Fisher's Blend Station v. Tax Commission, 297 U. S. 650, 80 L. ed. 956, decided March 30, 1936.

[fol. 19] A careful analysis of these cases in the light of what is said in Blumenstock Brothers Advertising Agency v. Curtis Publishing Company, 252 U. S. 436, 64 L. ed. 649, and in Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357, and in other cases cited and relied upon in the Blumenstock case, fails to persuade us that the advertising contracts themselves, although made between citizens of different states, are transactions in interstate commerce. That they are not so is the first point relied upon by the defendants for reversal. We rule the point in their favor. Indeed, the mere contracts are not commerce at all, neither intrastate nor interstate; no more so than contracts of insurance and they have been held to be neither. New York Life Insurance Co. v. Deer Lodge County, 231 U. S. 495, 58 L. ed. 332. Cf. Graniteville Mfg. Co. v. Query et al., 44 Fed. (2d) 64.

The Blumenstock case, supra, was a suit by plaintiff, a Missouri corporation, against the defendant, a Pennsylvania corporation, to recover treble damages under the Sherman Anti-trust Act. Section 2 of said act rendered unlawful any monopoly or attempt to monopolize any part of the trade or commerce among the several states. Section 7 of the same act authorized the recovery of treble damages sustained by any person in his business or prop-

erty by reason of anything forbidden or declared unlawful by the act. Sustaining the contention that the petition failed to state a cause of action, the court said:

"Commerce, as defined in the often quoted definition of Chief Justice Marshall, in Gibbons v. Ogden, 9 Wheat. 1, 189, 6 L. ed. 23, 68, is not traffic alone, it is intercourse,—'It describes the commercial intercourse between nations [fol. 20] and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse.'

In the present case, treating the allegations of the complaint as true, the subject-matter dealt with was the making of contracts for the insertion of advertising matter in certain periodicals belonging to the defendant. It may be conceded that the circulation and distribution of such publications throughout the country would amount to interstate commerce, but the circulation of these periodicals did not depend upon or have any direct relation to the advertising contracts which the plaintiff offered and the defendant refused to receive except upon the terms stated in the declaration. The advertising contracts did not involve any movement of goods or merchandise in interstate commerce, or any transmission of intelligence in such commerce."

The plaintiffs seek to distinguish this case by pointing out that in it the court was dealing with the case of a refusal to contract while here is presented the case of completed contracts. We see no point to the attempted distinction.

The opinions in *Post Printing and Publishing Co.* v. Brewster, supra, by the late Judge Pollock of the United States District Court in Kansas; State v. Salt Lake Tribune Pub. Co., supra, by the Supreme Court of Utah; and Little v. Smith, supra, by the Supreme Court of Kansas, carefully appraised, simply hold that state legislation which directly burdens an instrumentality of interstate commerce —the publication and interstate circulation of newspapers as it happened to be in those cases—is unconstitutional. [fol. 21] Each case involved a penal statute prohibiting the advertising of cigarettes. Fundamentally, the decisions rest upon the interstate character of the business of the newspapers involved. That the publication and interstate

circulation of newspapers is interstate commerce may not be questioned. Blumenstock Brothers Adv. Agency v. Curtis Pub. Co., supra; Konecky v. Jewish Press (C. C. A. 8th Ct.) 288 Fed. 179. But this fact alone does not draw all incidents of such a business within the protection of the interstate commerce clause of the federal constitution.

Expressions are to be found in some, if not all, of the three opinions first cited in the paragraph next above reflecting the idea that the advertising contracts themselves are transactions in interstate commerce. This view is directly contrary to the holding in the Blumenstock case that they are not. It rejects the principle of New York Life Ins. Co. v. Deer Lodge County, supra, declaring mere contracts not commerce at all.

It is interesting to note that the Blumenstock case had not been decided when Judge Pollock wrote his opinion in the Brewster case. But it antedates the Salt Lake Tribune case from Utah by six and one-half years and the decision of the Supreme Court of Kansas in Little v. Smith by more than seven years. Yet in neither of the last mentioned cases is the decision in the Blumenstock case noticed. Apparently, the court in neither of these cases had the benefit of that opinion, as certainly Judge Pollock did not in the Brewster case, in indicating a view that advertising contracts may be deemed transactions in interstate commerce.

[fol. 22] In addition to the cases discussed, plaintiffs put great reliance upon two decisions of the United States Supreme Court already cited. They are Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co. and International Text Book Co. v. Pigg. Indeed, plaintiff's counsel contends the former case, having been decided subsequently to the Blumenstock case, overrules the latter to the extent of any conflict. When the real basis of the later decision is understood, we think there is no conflict.

The Indiana Farmer's Guide case was another suit to collect treble damages under the Sherman Anti-trust Act by reason of a violation of Sections 1 and 2 of the act. The plaintiff was the publisher of "The Indiana Farmer's Guide" at Huntington, Indiana, having a circulation of 160,000 of which over two-thirds was in Indiana and approximately 50,000 in other states. The defendants, except Midwest Farm Paper Unit, Inc., were publishers of newspapers, general and not vocational in character, the names

of such papers being calculated, however, to develop a circulation among farmers in the six midwestern states where published. The larger part of the circulation of each of these newspapers was in the state where published. Most of the advertisers in all the papers were located in states other than the state of publication, about ninety per cent of petitioner's advertising coming from points outside Indiana. The combination in restraint of trade was claimed to be by virtue of an arrangement through the Midwest Unit whose officers and agents were representatives of the other defendants. By virtue of this arrangement a combination rate of advertising in all seven papers was much less than the total of separate charges for the same advertisement in any six.

[fol. 23] In this case the court cites and discusses the Blumenstock case, distinguishing it upon the ground that the subject matter there dealt with, as recited in the opinion in such case, "was the making of contracts for the insertion of advertising matter in certain periodicals belonging to the defendant;" Whereas, said the court:

"The business that is here alleged to have been damaged is the publication and circulation of these farm papers. That business includes the obtaining of advertising, the transportation between States of electrotypes sent respectively to petitioner and respondents by their customers to be used in setting up advertisements and the transportation of substantial quantities of the papers in interstate commerce. Advertising at compensatory rates is an essential element. The opinion in Blumenstock Bros. Adv. Agency v. Curtis Pub. Co., 252 U. S. 436, 64 L. ed. 649, 40 S. Ct. 385, supra, assumed that a publishing business such as that now under consideration would amount to interstate commerce. There is no ground for the contention that the evidence in this case is not sufficient to go to the jury on the question of interstate commerce." (Citations omitted.)

In the case at bar, the subject matter dealt with is the validity of an act imposing a tax measured by receipts arising (in the instant case) from contracts by citizens of other states with plaintiffs for insertion of advertisements in their magazine published in New Mexico. The mere fact that the magazine has an interstate circulation does not

give interstate character to the contracts. This was true of defendant's publications in the Blumenstock case.
[fol. 24] The substance of the material allegations in the petition in the Indiana Farmer's Guide case as recited by the court in its opinion is:

"that respondents entered into a contract, combination and conspiracy *for the purpose of obtaining a monopoly of the farm paper business* including the publication, circulation and distribution of advertisements of peculiar interest to farmers 'within the territory covered' by their publications; that in furtherance of this contract, combination and conspiracy they conceived a plan and design calculated to break down and destroy 'competition with other farm publications within said territory;' and that in order to effectuate that purpose they agreed upon a combination schedule of advertising rates for all their publications materially below the total of the separate rates of each." (Italics ours.)

The decisive allegation in this pleading is that which charges the doing of a thing declared unlawful by the Sherman Act, to-wit: the entering "into a contract, combination and conspiracy for the purpose of obtaining a monopoly of the farm paper business * * * 'within the territory covered' by their publications." Publication and circulation of these farm papers throughout the several states mentioned concededly was interstate commerce. The fact that such business included advertising at compensatory rates, contracts in reference to which were the means employed to effectuate the unlawful conspiracy, did not give interstate character to such contracts, even though between citizens of different states. We do not understand the opinion so to hold. Nor can we see the significance attached by plaintiffs to the court's mention of the farm paper busi-
[fol. 25] ness as including transportation between states of electrotypes to be used by the respondents in setting up advertisements. While not questioning the interstate character of such transportation, it was but an incident to the performance of the advertising contracts. Obviously, it seems to us, the transportation of these articles did not, in the court's mind, give decisive characterization as interstate commerce to the business involved, for at the very outset the court deduced that from the interstate circulation of the farm papers.

The transportation between states of the electrotypes falls within the distinction we draw between the case at bar and International Textbook Co. v. Pigg, also relied upon by plaintiffs. They argue that even if such a contract as that disclosed in the Blumenstock case be not deemed an interstate transaction, nevertheless, the interstate movement of advertising cuts, mats and copy contemplated by their contracts with advertisers makes such contracts and the performance thereof interstate transactions within the doctrine of the Pigg case,

But there is this difference between the two cases. In the Pigg case the continuous movement of text books, apparatus, letters of instruction and the like entered into the very essence of the contract. That movement was in constant execution and fulfillment of the contract itself—not a mere preliminary act incident to preparing one of the parties for performance as in the instant case. If plaintiffs be correct in this contention, a building contract between two residents of New Mexico for construction of a building in New Mexico will take on the characteristics of interstate commerce and be subject to federal regulation [fol. 26] by the mere circumstance that the contract calls for material of a certain kind whose purchase and delivery may involve a movement of goods in interstate commerce.

Furthermore, in view of the dismissal of the petition in the Blumenstock case for failure to state a cause of action for recovery of treble damages under the Sherman Act, we do not consider well founded plaintiffs' contention that advertising so promotes the sale of the goods advertised as to start their flow in interstate commerce, thereby characterizing same as an interstate transaction. Allegations of similar import appear in the petition in that case. This consideration seems too remote to be decisive and was evidently so considered by the court in the Blumenstock case.

The most that fairly can be said of the tax here imposed in its relation to plaintiffs' business, it seems to us, is that it indirectly affects interstate commerce. It is only such transactions as directly affect same and impose a direct burden thereon that fall within the interdiction of the commerce clause of the federal constitution. Schechter Poultry Corporation v. United States, 295 U. S. 495, 79 L. ed. 1570, 97 A. L. R. 947, and cases cited. See also Carter v. Carter Coal Co., 298 U. S. 238, 80 L. ed. 1160.

In the Schechter case, one ground urged in support of federal regulation of the live poultry industry of the metropolitan area in and about New York City was the power of Congress over interstate commerce. It was argued that hours and wages affect prices; that payment of lower wages or reducing cost by exacting long hours would enable the operator in the industry so doing to sell at lower prices, since labor represents 50 to 60 percent of these costs; that [fol. 27] this practice results in a demand for a cheaper grade of goods; and that the cutting of prices demoralizes the price structure. Interstate commerce was thus brought in only upon the charge that violation of certain Code provisions regulating the industry—as to hours and wages of employees and local sales—"*affected*" interstate commerce.

Holding against the contention that the claimed violations directly "affected" interstate commerce, the court, among other things, said:

"In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. Direct effects are illustrated by the railroad cases we have cited, as e. g., the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal [fol. 28] authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control."

At most, the tax challenged affects only indirectly the interstate business of plaintiffs. So does the property tax they pay on tangible property located in New Mexico; and as well the property tax paid by an interstate carrier on its property having permanent situs in the taxing state, even though employed in interstate transportation of freight and passengers. But no more in the one case than in the other does this indirect burden relieve such property from bearing its just share of state taxation.

That the legislature did not intend to transcend provisions of the commerce clause of the federal constitution is shown by express language of the act. Section 202 of Chapter 7 thereof reads:

"None of the taxes levied by this act shall be construed to apply to transactions in interstate or foreign commerce, or commerce with Indian tribes."

We are not convinced that the act in its application to plaintiffs imposes an unconstitutional burden on interstate commerce. Controlled as we are by decisions of the United States Supreme Court on such matters, we have carefully weighed decisions cited from that court and believe our conclusion in harmony with them.

It follows that the trial court erred in overruling the demurrer of the defendants. Accordingly, the judgment [fol. 29] entered against them following their refusal to plead further will be reversed. The cause will be remanded to the district court of Sante Fe County with directions to sustain the demurrer and for further proceedings in conformity with the views herein expressed.

It is so ordered.

Daniel K. Sadler, Justice.

We concur: Andrew H. Hudspeth, Chief Justice. Howard L. Bickley, Justice. Charles R. Brice, Justice. A. L. Zinn, Justice.

[fols. 30-31] In Supreme Court of New Mexico

No. 4210

Judgment of Reversal—Entered February 22, 1937

This cause having heretofore been argued, submitted and taken under advisement, and the Court, being now suffi-

ciently advised in the premises, announces its decision by Justice Sadler, Chief Justice Hudspeth, Justices Bickley, Brice and Zinn concurring, reversing the judgment of the District Court for the reasons given in the opinion of the Court on file.

It is, Therefore, Considered, Ordered and Adjudged by the Court that the judgment of the District Court in and for the County of Santa Fe, whence this cause came into this Court, be and the same is hereby reversed and the cause is remanded to the District Court of Santa Fe County with directions to sustain the demurrer and for further proceedings in conformity with the views expressed in said opinion.

It is Further Ordered and Adjudged that appellants do have and recover their costs from appellee in this behalf expended to be taxed by the Clerk.

[fol. 32] IN DISTRICT COURT OF SANTA FE COUNTY

MOTION TO SUSTAIN DEMURRER—Filed March 23, 1937

Comes now the Bureau of Revenue and John A. Bingaman, Commissioner of Revenue, by and through their attorney move the Court to sustain the Demurrer pursuant to directions of the Supreme Court in the opinion rendered in said cause of action on appeal upon the 22nd day of February, 1937, which said Demurrer was heretofore argued and overruled by this court before said appeal was granted.

(Signed) Frank H. Patton, Frank H. Patton, Attorney General of N. M.

[fol. 33] IN DISTRICT COURT OF SANTA FE COUNTY

ORDER SUSTAINING DEMURRER—Filed March 23, 1937

This matter coming on before the Court for hearing upon motion of defendants to sustain a demurrer heretofore filed in said cause and the court being sufficiently advised in the premises and being advised particularly that the Supreme Court of the State of New Mexico, on the 22nd day of February, 1937, rendered an opinion in said cause of action remanding same to the District Court of Santa Fe County with directions to sustain the demurrer,

Now, Therefore, it is hereby Ordered and Adjudged that the said demurrer, pursuant to said directions of the

Supreme Court of the State of New Mexico, be and the same hereby is sustained, to all of which the plaintiffs object and except.

(Signed) David Chavez, Jr., District Judge.

In District Court of Santa Fe County

Refusal and Inability by Plaintiff to Plead Further—Filed April 22, 1937

Comes now the above named plaintiff by its attorney, D. A. Macpherson, Jr., and announces to the Court that it refuses to further amend its amended complaint on file herein and further states that it is unable to do so. Plaintiff alleges that its amended complaint on file herein contains each and every allegation that it is possible to allege in order to establish and set forth its cause of action; that there are no other facts or circumstances that it could possibly allege; that plaintiff accordingly stands on its amended complaint herein and refuses and is unable to plead further.

(Signed) D. A. Macpherson, Jr., Attorney for Plaintiff.

[fol. 34] In District Court of Santa Fe County

Motion for Final Judgment—Filed April 22, 1937

Come now the above defendants, by Frank Patton, Attorney General of New Mexico, and show to the Court:

That following the decision of the Supreme Court of New Mexico on the appeal of this cause, a mandate was sent to this Court, directing that its former order overruling defendants' demurrer be reversed and further directing that the defendants' demurrer be now sustained; that pursuant thereto this Court has entered an order sustaining said defendants' demurrer to plaintiff's amended complaint; that plaintiff has subsequently announced to the Court its inability and refusal to plead further, plaintiff alleging that its amended complaint contains all of the facts and circumstances it is able to allege to set forth a cause of action; and that plaintiff elects to stand on said amended complaint; that in view of said position taken by plaintiff that the Court should enter final judgment herein against plaintiff and in favor of defendants.

Wherefore, defendants move that the Court dismiss plaintiff's amended complaint with prejudice, and enter final judgment against plaintiff and in favor of defendants.

(Signed) Frank H. Patton, Attorney General of New Mexico, Attorney for Defendants.

[fol. 35] In District Court of Santa Fe County

Final Judgment—Filed April 22, 1937

[On left margin:] O. K., F. H. P. O. K., D. A. M., Jr.

This cause coming on to be heard upon the motion of defendants for final judgment, plaintiff appearing by its attorney, D. A. Macpherson, Jr., and defendants appearing by Honorable Frank H. Patton, Attorney General for the State of New Mexico, and the Court having examined the pleadings and record in this cause and finding that in accordance with the mandate from the Supreme Court of New Mexico following defendants appeal herein, this Court has sustained the defendants' demurrer to the amended complaint on file herein; that subsequent thereto plaintiff has announced its refusal and inability to amend further its amended complaint herein, plaintiff alleging it has in said amended complaint set forth all facts and circumstances it possibly could allege in order to establish a cause of action and plaintiff further announcing it elects to stand on said amended complaint, and the Court having heard arguments for attorneys and being fully advised, finds:

That a complete determination of this suit on its merits has been made and all issues between the parties adjudicated, and that final judgment should be entered against plaintiff and in favor of defendants.

Wherefore, it is Ordered, Adjudged and Decreed that a final judgment issue and that the cause of action of plaintiff, as set forth in its amended complaint on file herein, be and the same is hereby dismissed with prejudice and that all relief prayed for by plaintiff be denied.

[fols. 36-39] It is Further Ordered, Adjudged and Decreed that the amount of tax paid by plaintiff under protest, to-wit; the sum of $80.27, and held by defendants in the Emergency School Suspense Fund as established by law, be and the same is hereby ordered released therefrom and ordered

paid into the Emergency School Fund and thereafter distributed as provided by law.

It is Finally Ordered that defendants recover their costs herein. To all of which plaintiff objects and excepts, which exceptions are allowed.

(Signed) Thomas J. Mabry, District Judge of the Second Judicial District, Sitting at the Designation and Request of David Chavez, Jr., Judge of the First Judicial District in and for Santa Fe County, New Mexico, now absent.

[fol. 40] IN SUPREME COURT OF NEW MEXICO

Cause No. 4310

OPINION—Filed May 10, 1937

Per CURIAM:

This is the second appeal of this case. For the facts see our former opinion, Western Live Stock v. Bureau of Revenue, 41 N. M. —, 65 P. (2d) 863. Broadly, but a single issue was presented on the former appeal, namely, whether C. 7, N. M. Session Laws of 1934 (Special Session), in its application to plaintiffs, operates as an unconstitutional burden on interstate commerce. We held that it does not, reversing the judgment in plaintiffs' favor by the district court of Santa Fe County, and remanded the cause to said court with directions to set aside its judgment and to sustain defendants' demurrer. "Interstate commerce" was put into the case through plaintiffs' claim that advertising contracts between them and out-of-state advertisers, and certain acts incident to performance of such contracts, constitute interstate transactions.

The district court of Santa Fe County, following the directions of our mandate, duly entered an order sustaining defendants' demurrer. Thereupon plaintiffs filed a written declaration of inability to amend and of refusal to plead further. The district court then rendered judgment against the plaintiffs, dismissing their complaint with prejudice. They seek a review of that judgment by this appeal.

The matter is before us upon the former record and a new transcript supplementing same, showing the proceedings subsequent to mandate. The parties have stipulated that

the briefs filed by counsel for the respective parties on the [fol. 41] former appeal shall be considered by the court as their briefs on this appeal. We thus have before us the same question, presented on the same record (with the addition of the above mentioned proceedings subsequent to mandate contained in the new transcript) and the same briefs. Obviously, the issue thus presented is ruled and foreclosed by our decision on the former appeal. It follows that the judgment of the district court must be affirmed.

It is so ordered.

Andrew H. Hudspeth, Chief Justice. Daniel K. Sadler, Justice. Charles R. Brice, Justice. A. L. Zinn, Justice.

Bickley, J., being absent, did not participate.

[fol. 42] In Supreme Court of New Mexico

Judgment of Affirmance—Entered May 10, 1937

This cause having heretofore been submitted and taken under advisement, and the Court, being now sufficiently advised in the premises, announces its per curiam decision, Chief Justice Hudspeth, Justices Sadler, Brice and Zinn participating, Justice Bickley being absent, affirming the judgment of the District Court for the reasons given in the opinion of the Court on file.

It is, Therefore Considered, Ordered and Adjudged by the Court that the judgment of the District Court in and for the County of Santa Fe, whence this cause came into this Court, be and the same is hereby affirmed.

[fol. 43] In Supreme Court of New Mexico

Petition for Appeal, Assignment of Errors and Prayer for Reversal—Filed June 18, 1937

Petition for Appeal

Considering themselves aggrieved by the final decision of the Supreme Court of the State of New Mexico, in the above entitled cause, the plaintiffs therein, Western Live Stock, a partnership composed of Frasier Biggs and D. F. Biggs,

hereby pray an appeal to the Supreme Court of the United States and for an order fixing the amount of the bond thereon, and show to the Court, in support thereof, that the case is one in which there was drawn in question the validity of a statute of the State of New Mexico on the ground of its being repugnant to the Constitution of the United States and the decision of the Supreme Court of the State of New Mexico is in favor of the validity of said statute.

Assignment of Errors

And appellants assign the following errors of the Court below:

1. The Supreme Court of New Mexico erred in failing and refusing to hold (a) that advertising contracts between appellants and out-of-state advertisers, which required the interstate transmission of advertising copy and materials, the printing of the magazines, and distribution to appellants' subscribers throughout various states of the Union, and ultimate payment being made to appellants in New Mexico from across state lines, amounted to interstate commerce; (b) that said advertising contracts, which both promoted and resulted in the interstate shipment of the advertised goods, constituted interstate commerce.

2. The Supreme Court of New Mexico erred in failing and refusing to hold that Chapter 7 of the Special Session Laws of 1934, imposing a sales tax of 2% on the gross proceeds of [fol. 44] appellants' advertising from out-of-state or foreign advertisers, placed a direct and substantial burden on interstate commerce, and is accordingly repugnant to Article I, Section 8, of the Constitution of the United States, illegal and void.

Prayer for Reversal

For which errors the appellants pray that said judgment and decision of the Supreme Court of the State of New Mexico, dated May 10, 1937, in the above entitled cause, be reversed and a judgment rendered in favor of said appellants, and for costs.

(Signed) D. A. Macpherson, Jr., Counsel for Appellants.

[fols. 45-56] IN SUPREME COURT OF NEW MEXICO

ORDER ALLOWING APPEAL—Filed June 18, 1937

The appellants in the above entitled suit having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of the State of New Mexico on the 10th day of May, 1937, and from each and every part thereof, and having presented and filed their petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided:

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of New Mexico in the above entitled cause, as provided by law, and it is further ordered that the clerk of the Supreme Court of the State of New Mexico shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within 45 days of this date.

And it is further ordered that security for costs on appeal be fixed in the sum of Five Hundred Dollars ($500.00).

Dated June 18th, 1937.

(Signed) Andrew H. Hudspeth, Chief Justice of the Supreme Court of the State of New Mexico.

[fol. 57] IN SUPREME COURT OF THE UNITED STATES

APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed August 16, 1937

Appellant intends to rely upon the following points:

1

A newspaper or magazine circulating over an area embracing various states is engaged in interstate commerce.

2

Advertising published in a newspaper or magazine circulating over an area embracing various states likewise becomes interstate commerce.

3

Advertising contracts between a newspaper or magazine published in one state and advertisers residing in other states stipulating for the transmission between the contracting parties of the advertising copy and materials, stipulating for the printing of the advertising, and the distribution of the newspapers or magazines containing the same to the subscribers and readers thereof who reside in numerous states of the Union and ultimately providing for payment for said advertising constitute instrumentalities of inter-[fol. 58] state commerce and are in effect interstate commerce.

4

The sale of products in the original package to purchasers residing in states other than where said products are originally manufactured or stored constitutes interstate commerce. Advertising by out-of-state advertisers directly promotes, aids, and results in the sale of such products, which are thereby transmitted in interstate commerce. Such advertising is an integral step in the interstate movement of the goods and definitely becomes an instrumentality and part of interstate commerce.

5

A state tax on the gross receipts of advertising by out-of-state advertisers imposes a direct and substantial burden on interstate commerce and is unconstitutional and void. Such tax tends to impede and hamper and even destroy such advertising, and the interstate commerce in the advertised products.

6

A state tax on the gross receipts of advertising of all kinds, whether from local or foreign advertisers, is invalid in the ratio that the newspaper's or magazine's circulation in foreign states bears to its total circulation everythere. Appellant's challenge in this suit is limited, however, to the tax on the proceeds from out-of-state advertising.

7

A tax on the gross receipts of advertising, which makes no provision for segregating the local from the interstate business, is invalid.

8

The tax imposed by Chapter 7 of the New Mexico Special [fol. 59] Session Laws of 1934, levying a tax on the gross receipts of advertising in newspapers and magazines, is unconstitutional and void, insofar as it attempts to levy a tax on advertising from out-of-state advertisers, and furthermore, is unconstitutional and void on all advertising to the extent that the foreign circulation of the newspaper or magazine bears to its total circulation everywhere.

9

The tax on newspapers and magazines levied by Chapter 7 of the New Mexico Special Session Laws of 1934 is not levied on the publication of newspapers or on the particular contract that might be executed for advertising, but on the service performed by the newspaper or magazine in transmitting intelligence from said newspaper or magazine to its subscribers and readers residing in numerous states of the Union; in other words, the tax is on the business of advertising.

10

The Supreme Court of New Mexico erred in refusing to hold Chapter 7 of the New Mexico Special Session Laws of 1934 invalid and unconstitutional insofar as said act attempts to levy a tax on the gross receipts of newspapers and magazines received from advertisers residing in other states of the Union than New Mexico, and in refusing to establish the aforementioned points on which appellant relied and now relies, and in affirming the final judgment of the District Court of Santa Fe County, New Mexico.

Appellant specifies the following parts of the record which it thinks necessary for the consideration of the aforementioned points, and which need be printed by the Clerk for the hearing of the case:

[fol. 60]

Title of Paper	Page in Transcript
Amended Complaint	1 et seq.
Demurrer	8 et seq.
Petition to Amend the Amended Complaint by Interlineation	9 et seq.
Order Permitting Amendments to Amend Complaint by Interlineation	11
Final Judgment, Order Overruling Demurrer and Allowing Appeal	11 et seq.
Opinion of Supreme Court in cause No. 4210	16 et seq.
Judgment of Reversal of Supreme Court in cause No. 4210	30
Motion to Sustain Demurrer	32
Order Sustaining Demurrer	33
Refusal and Inability by Plaintiff to Plead Further	33
Motion for Final Judgment	34
Final Judgment	35 et seq.
Opinion of Supreme Court in cause No. 4310	40 et seq.
Judgment of Affirmance of Supreme Court in cause No. 4310	42
Petition for Appeal to Supreme Court of the United States, Assignment of Errors and Prayer for Reversal	43 et seq.
Order Allowing Appeal	45

D. A. Macpherson, Jr., Counsel for Appellant, 810 First National Bank Building, Albuquerque, New Mexico.

[fol. 61] Proof of Service

STATE OF NEW MEXICO,
County of Bernalillo, ss:

D. A. Macpherson, Jr., of lawful age, on oath states that he is attorney for the above named appellant and that on the 9th day of August, 1937, he made service of appellant's statement of points to be relied upon and designation of parts of the record to be printed upon the above named appellees by depositing a true and correct copy thereof in the United States Post Office at Albuquerque, New Mexico, enclosed in a sealed envelope, and addressed to Frank H. Patton, Attorney General of New Mexico,

Santa Fe, New Mexico, Attorney for the above named appellees, postage fully prepaid, said service being in accordance with the statutes of New Mexico.

D. A. Macpherson, Jr.

Subscribed and sworn to before me this 9th day of August, 1937. E. A. Polansky, Notary Public. My commission expires Aug. 6, 1940. (Seal.)

[fol. 62] [File endorsement omitted.]

Endorsed on cover: Enter J. R. Modrall. File No. 41,-803. New Mexico Supreme Court. Term No. 322. Western Live Stock, A Partnership composed of Frazier Biggs and D. F. Biggs, appellant, vs. Bureau of Revenue and John A. Bingaman, Commissioner of Revenue. Filed August 16, 1937. Term No..322, O. T., 1937.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 322

WESTERN LIVE STOCK, A PARTNERSHIP COMPOSED OF FRAZIER BIGGS AND D. F. BIGGS,

Appellant,

vs.

BUREAU OF REVENUE AND JOHN A. BINGAMAN, COMMISSIONER OF REVENUE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO.

STATEMENT AS TO JURISDICTION.

Appellants publish a monthly livestock magazine at Albuquerque, New Mexico, known as "Western Live Stock". It has a general circulation in New Mexico and other States. One of its chief sources of revenue is advertising. Appellants solicit and publish, under contracts, advertisements of products manufactured elsewhere than in New Mexico, such products to be sold, shipped and transported from the manufacturer to the customer. These out-of-State or foreign advertisements are obtained by appellants both through personal solicitation by its own repre-

sentatives, or through advertising agencies located in States other than New Mexico. Some advertising contracts are between appellants and the manufacturers themselves, others only with the advertising agencies.

In the preparation of the advertisements for insertion in appellants' magazine, certain advertising material and copy are sent to appellants by said foreign advertisers, part of which is thereafter returned by appellants to the advertisers. As part of the advertising contract, appellants must print the advertisements and distribute the magazines to their subscribers throughout the various States of the Union, before becoming entitled to payment from the foreign advertisers.

Chapter 7 of the New Mexico Special Session Laws of 1934 (appearing at pages 11 to 33, inclusive, of the official report thereof) levies what is designated an "excise" or "privilege" tax, and by Section 201, Subsection I, provides for the application of said tax to certain businesses as follows:

> "I. At an amount equal to 2% of the gross receipts of any person engaging or continuing in any of the following businesses: * * * publication of newspapers and magazines (but the gross receipts of the business of publishing newspapers or magazines shall include only the amounts received for the sale of advertising space) * * *."

Section 202 provides the tax shall not apply to transactions in interstate commerce. Other sections make it illegal to continue in business without payment of the tax, empower the taxing authorities to obtain distress warrants, restrain and enjoin further operations by a business delinquent in payment of the tax, etc.

Appellants filed suit to collect $80.27 paid under protest, representing two per cent (with penalties and interest) of the gross receipts derived from out-of-State advertising

over a certain period, on the ground that said advertising and advertising contracts constituted interstate commerce, that said tax amounted to a direct and substantial burden thereon, and that accordingly said tax was repugnant to Article I, Section 8, of the Constitution of the United States.

In particular, appellants by their amended complaint allege: (1) that the advertising contracts promote and result in the interstate shipment of the advertised goods (R. 3); (2) that the process of advertising requires the interstate transmission of advertising copy and materials, the printing of the magazines, their distribution to appellants' subscribers throughout various States of the Union, and ultimate payment coming to appellants from across State line (R. 10); (3) that appellants could not segregate its intrastate and interstate advertising, and to discontinue the latter would ruin appellants' business (R. 10); that accordingly said contracts are instrumentalities of, and said advertising is a part of interstate commerce, which is under the sole jurisdiction of the Federal Government, and immune from direct interference by a State (R. 3, 6); (4) that a tax levied on the gross receipts derived from interstate commerce is a direct and immediate burden thereon, rather than an indirect or incidental burden, and is illegal and void (R. 5).

Appellees demurred (R. 8) and the District Court of Santa Fe County, New Mexico, overruled the demurrer and entered final judgment for appellants (R. 11). On appeal, the Supreme Court of New Mexico reversed the lower court, and ordered that the demurrer be sustained, holding that the advertising contracts were not transactions in interstate commerce (R. 21), and that even if they were, that the tax in question was at best an indirect burden thereon and not unconstitutional (R. 28). The opinion clearly points out that appellants' sole challenge to the tax is that it violates the "Commerce Clause" of the Federal

Constitution, and appellees' sole defense is that it does not (R. 19). The opinion of the Supreme Court of New Mexico on this first appeal is hereinafter set forth as Exhibit "A" hereto.

To secure a final judgment, appellants returned to the lower court and filed a written declaration of inability and refusal to amend further, and election to stand on their amended complaint (R. 34). Thereupon, on motion of appellees, the District Court of Santa Fe County entered final judgment against appellants, and dismissed their amended complaint with prejudice, appellants saving their exceptions (R. 36-7). Appellants then appealed the cause, and the Supreme Court of New Mexico, on the second appeal, affirmed the lower court, affirming the judgment which dismissed appellants' action with prejudice (R. 41). The opinion of the Supreme Court of New Mexico, on the second appeal, is hereinafter set forth as Exhibit "B" hereto.

Appellants contend that:

1. The advertising contracts and processes here involved amount to interstate commerce (embracing the first three points set forth above in the sixth paragraph of this statement of jurisdiction):

Indiana Farmers' Guide Publishing Co. v. *Prairie Farmers Publishing Co.*, 293 U. S. 268, 55 S. Ct. 182, 79 L. Ed. 356;

Post Printing & Publishing Co. v. *Brewster*, 246 Fed. 321;

State v. *Salt Lake Tribune Publishing Co.*, 249 Pac. 474, 48 A. L. R. 553;

Little v. *Smith*, 124 Kan. 237, 242; 257 Pac. 959, 57 A. L. R. 100;

Fishers Blend Station, Inc., v. *Tax Commission of the State of Washington et al.*, 297 U. S. 650, 80 L. Ed. 956, 56 S. Ct. 608;

International Text Book Co. v. *Pigg*, 217 U. S. 91.

2. That Chapter 7 of the New Mexico Special Session Laws of 1934 imposes a direct and substantial burden on interstate commerce, and is void as violating Article I, Section 8 of the Federal Constitution:

United States Glue Co. v. *Town of Oak Creek,* 247 U. S. 321, 62 L. Ed. 135;

Fishers Blend Station, Inc., v. *Tax Commission of the State of Washington et al.,* 297 U. S. 650, 80 L. Ed. 956, 56 S. Ct. 608;

Dahnke-Walker Milling Co. v. *Bondurant,* 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239;

Bowman v. *Continental Oil Co.,* 256 U. S. 642, 41 S. Ct. 606, 65 L. Ed. 1139.

We desire to point out that no authority, either Federal or State, covering the exact question under consideration, has been found. Inasmuch as a number of states other than New Mexico have enacted so-called "sales tax" statutes which purport to give authority to collect on "foreign" advertising, as in the case at issue, the question here involved is substantial, serious, and of great public interest.

The Supreme Court of New Mexico entered judgment on May 10, 1937, affirming the lower court's dismissal with prejudice of appellants' action, thereby upholding the aforementioned State statute in the face of appellants' challenge as to its constitutionality under the Federal Constitution. This appeal is prosecuted under Section 344-a of Title 28 of the United States Code Annotated (Judicial Code, Sec. 237, as amended; Act of February 13, 1925, C. 229, Sec. 1; 43 Stat. 937). Appellants' petition for allowance of this appeal was filed on January 18th, 1937.

J. R. MODRALL,
D. A. MACPHERSON, JR.,
Counsel for Appellants.

EXHIBIT "A".

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO.

No. 4210.

WESTERN LIVE STOCK, a Partnership Composed of Frazier Biggs and D. F. Biggs, *Plaintiffs and Appellees,*

vs.

BUREAU OF REVENUE and JOHN A. BINGAMAN, Commissioner of Revenue, *Defendants and Appellants.*

Appeal from the District Court of Santa Fe County.

Otero, Judge.

Filed February 22, 1937.

Reported at 65 P. (2) 863, 41 N. M. 141.

Opinion.

SADLER, *J.:*

The plaintiffs (appellees) sued in the district court of Santa Fe County to recover taxes in the sum of $80.27, paid under protest, imposed by the provisions of Chapter 7 of N. M. Session Laws of 1934 (Special Session) upon the receipts arising from certain advertising. Section 314 of the Act extends authority to seek recovery by suit of taxes so paid on conditions therein named.

Judgment was rendered against defendants following their refusal to plead further upon entry of the trial court's order overruling a demurrer interposed by them to plaintiffs' amended complaint, hereinafter referred to as the complaint. They prosecute this appeal to secure a correction of the judgment claimed to be erroneous.

The essential facts, as disclosed by the complaint, are these. The plaintiffs are partners operating under the firm name of Western Live Stock. Their business is the publication of a trade journal or magazine at Albuquerque,

New Mexico, known as "Western Live Stock." It has a general circulation in New Mexico and other states. It is circulated by means of the United States mails, motor trucks, railroads and express.

One of plaintiffs' sources of revenue is, of course, advertising. The magazine receives and publishes, under contracts, advertisements of products which are manufactured elsewhere than in New Mexico, such products to be sold, shipped and transported from the manufacturer to the customer. These foreign advertisements are obtained by plaintiff both through personal solicitation and through what are known as advertising agencies, located in states other than New Mexico. Some of these advertising contracts are made between plaintiffs and the manufacturer, located in a foreign state, while others, as stated, are made between the plaintiffs and an advertising agency, such advertising agency having a different and a separate contract with the manufacturer and in such cases all dealings in connection therewith are between the plaintiffs and the agency.

In the preparation of the advertisements for insertion in the plaintiffs' magazine, certain advertising cuts, mats, material, information, intelligence and copy are sent to plaintiffs by said foreign advertisers, and plaintiffs receive compensation pursuant to the contract to carry the advertising from such foreign advertisers, and the receipts arising from such advertising contracts form the measure of the tax imposed in its application to plaintiffs.

This advertising is naturally designed to promote the sale of the advertised products. The advertising contracts so made with residents of other states require an interchange of correspondence between the advertiser and plaintiffs, contemplate the forwarding prior to publication of plats, cuts, mats, engravings, copy and information from outside the state to plaintiffs within the state, as aforesaid, and the circulation and distribution of such magazines to subscribers and purchasers in New Mexico and other states.

The challenge to the act laid as a basis of recovery is briefly that the act, in the respect sought to be enforced against plaintiffs, violates section 8 of Article I of the Constitution of the United States, known as the "Commerce

Clause", by placing an unconstitutional burden on interstate commerce. The gist of the demurrer, likewise in brief, is that under the facts pleaded it does not.

The tax assailed is imposed by section 201 of said Chapter 7, Special Session Laws of 1934, reading as follows:

> "There is hereby levied, and shall be collected by the Tax Commission, privilege taxes, measured by the amount or volume of business done, against the persons, on account of their business activities, engaging, or continuing, within the State of New Mexico, in any business as herein defined, and in the amounts determined by the application of rates against gross receipts, as follows:"

As applicable to plaintiffs the measure of the tax is prescribed by sub-paragraph I of section 201, reading:

> "At an amount equal to two per cent of the gross receipts of any person engaging or continuing in any of the following businesses: * * * publication of newspapers and magazines (but the gross receipts of the business of publishing newspapers or magazines shall include only the amounts received for the sale of advertising space), * * *."

The plaintiffs chiefly rest their argument supporting correctness of the trial court's ruling on the demurrer on certain state and federal cases, to-wit, Post Printing & Publishing Co. *v.* Brewster (U. S. D. C.) 246 Fed. 321; State *v.* Salt Lake Tribune Pub. Co., 68 Utah 187, 249 P. 474; Little *v.* Smith, 124 Kan. 237, 257 P. 959; International Textbook Co. *v.* Pigg, 217 U. S. 91, 54 L. Ed. 678; Indiana Farmer's Guide Publ. Co. *v.* Prairies Farmer Pub. Co., 293 U. S. 268, 79 L. Ed. 356; and the case of Fisher's Blend Station *v.* Tax Commission, 297 U. S. 650, 80 L. Ed. 956, decided March 30, 1936.

A careful analysis of these cases in the light of what is said in Blumenstock Brothers Advertising Agency *v.* Curtis Publishing Company, 252, U. S. 436, 64 L. Ed. 649, and in Paul *v.* Virginia, 8 Wall. 168, 19 L. Ed. 347, and in other cases cited and relied upon in the Blumenstock case, fails to

persuade us that the advertising contracts themselves, although made between citizens of different states, are transactions in interstate commerce. That they are not so is the first point relied upon by the defendants for reversal. We rule the point in their favor. Indeed, the mere contracts are not commerce at all, neither intrastate nor interstate; no more so than contracts of insurance and they have been held to be neither. New York Life Insurance Co. *v.* Deer Lodge County, 231 U. S. 495, 58 L. Ed. 332. Cf. Graniteville Mfg. Co. *v.* Query *et al.*, 44 Fed. (2d) 64.

The Blumenstock case, *supra*, was a suit by plaintiff, a Missouri corporation, against the defendant, a Pennsylvania corporation, to recover treble damages under the Sherman Antitrust Act. Section 2 of said act rendered unlawful any monopoly or attempt to monopolize any part of the trade or commerce among the several states. Section 7 of the same act authorized the recovery of treble damages sustained by any person in his business or property by reason of anything forbidden or declared unlawful by the act. Sustaining the contention that the petition failed to state a cause of action, the court said:

> "Commerce, as defined in the often quoted definition of Chief Justice Marshall, in Gibbons v. Ogden, 9 Wheat. 1, 189, 6 L. ed. 23, 68, is not traffic alone, it is intercourse—'It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse.'
>
> In the present case, treating the allegations of the complaint as true, the subject-matter dealt with was the making of contracts for the insertion of advertising matter in certain periodicals belonging to the defendant. It may be conceded that the circulation and distribution of such publications throughout the country would amount to interstate commerce, but the circulation of these periodicals did not depend upon or have any direct relation to the advertising contracts which the plaintiff offered and the defendant refused to receive except upon the terms stated in the

declaration. The advertising contracts did not involve any movement of goods or merchandise in interstate commerce, or any transmission of intelligence in such commerce."

The plaintiffs seek to distinguish this case by pointing out that in it the court was dealing with the case of a *refusal* to contract while here is presented the case of *completed* contracts. We see no point to the attempted distinction.

The opinions in Post Printing and Publishing Co. *v.* Brewster, *supra,* by the late Judge Pollock of the United States District Court in Kansas; State *v.* Salt Lake Tribune Pub. Co., *supra,* by the Supreme Court of Utah; and Little *v.* Smith, *supra,* by the Supreme Court of Kansas, carefully appraised, simply hold that state legislation which directly burdens an instrumentality of interstate commerce —the publication and interstate circulation of newspapers as it happened to be in those cases—is unconstitutional. Each case involved a penal statute prohibiting the advertising of cigarettes. Fundamentally, the decisions rest upon the interstate character of the business of the newspapers involved. That the publication and interstate circulation of newspapers is interstate commerce may not be questioned. Blumenstock Brothers Adv. Agency *v.* Curtis Pub. Co., *supra;* Konecky *v.* Jewish Press (C. C. A. 8th Ct.), 288 Fed. 179. But this fact alone does not draw all incidents of such a business within the protection of the interstate commerce clause of the federal constitution.

Expressions are to be found in some, if not all, of the three opinions first cited in the paragraph next above reflecting the idea that the advertising contracts themselves are transactions in interstate commerce. This view is directly contrary to the holding in the Blumenstock case that they are not. It rejects the principle of New York Life Ins. Co. *v.* Deer Lodge County, *supra,* declaring mere contracts not commerce at all.

It is interesting to note that the Blumenstock case had not been decided when Judge Pollock wrote his opinion in the Brewster case. But it antedates the Salt Lake Tribune case from Utah by six and one-half years and the de-

cision of the Supreme Court of Kansas in Little *v.* Smith by more than seven years. Yet in neither of the last mentioned cases is the decision in the Blumenstock case noticed. Apparently, the court in neither of these cases had the benefit of that opinion, as certainly Judge Pollock did not in the Brewster case, in indicating a view that advertising contracts may be deemed transactions in interstate commerce.

In addition to the cases discussed, plaintiffs put great reliance upon two decisions of the United States Supreme Court already cited. They are Indiana Farmer's Guide Pub. Co. *v.* Prairie Farmer Pub. Co. and International Test Book Co. *v.* Pigg. Indeed, plaintiff's counsel contends the former case, having been decided subsequently to the Blumenstock case, overrules the latter to the extent of any conflict. When the real basis of the later decision is understood, we think there is no conflict.

The Indiana Farmer's Guide case was another suit to collect treble damages under the Sherman Anti-trust Act by reason of a violation of Sections 1 and 2 of the act. The plaintiff was the publisher of "The Indiana Farmer's Guide at Huntington, Indiana, having a circulation of 160,000 of which over two-thirds was in Indiana and approximately 50,000 in other states. The defendants, except Midwest Farm Paper Unit, Inc., were publishers of newspapers, general and not vocational in character, the names of such papers being calculated, however, to develop a circulation among farmers in the six midwestern states where published. The larger part of the circulation of each of these newspapers was in the state where published. Most of the advertisers in all the papers were located in states other than the state of publication, about ninety per cent of petitioner's advertising coming from points outside Indiana. The combination in restraint of trade was claimed to be by virtue of an arrangement through the Midwest Unit whose officers and agents were representatives of the other defendants. By virtue of this arrangement a combination rate of advertising in all seven papers was much less than the total of separate charges for the same advertisement in any six.

In this case the court cites and discusses the Blumenstock case, distinguishing it upon the ground that the subject matter there dealt with, as recited in the opinion in such case, "was the making of contracts for the insertion of advertising matter in certain periodicals belonging to the defendant;" Whereas, said the court:

> "The business that is here alleged to have been damaged is the publication and circulation of these farm papers. That business includes the obtaining of advertising, the transportation between States of electrotypes sent respectively to petitioner and respondents by their customers to be used in setting up advertisements and the transportation of substantial quantities of the papers in interstate commerce. Advertising at compensatory rates is an essential element. The opinion in Blumenstock Bros. Adv. Agency *v.* Curtis Pub. Co., 252 U. S. 436, 64 L. Ed. 649, 40 S. Ct. 385, *supra*, assumed that a publishing business such as that now under consideration would amount to interstate commerce. There is no ground for the contention that the evidence in this case is not sufficient to go to the jury on the question of interstate commerce." (Citations omitted.)

In the case at bar, the subject matter dealt with is the validity of an act imposing a tax measured by receipts arising (in the instant case) from contracts by citizens of other states with plaintiffs for insertion of advertisements in their magazine published in New Mexico. The mere fact that the magazine has an interstate circulation does not give interstate character to the contracts. This was true of defendant's publications in the Blumenstock case.

The substance of the material allegations in the petition in the Indiana Farmer's Guide case as recited by the court in its opinion is:

> "that respondents entered into a contract, combination and conspiracy *for the purpose of obtaining a monopoly of the farm paper business* including the publication, circulation and distribution of advertisements of peculiar interest to farmers 'within the territory covered' by their publications; that in furtherance of

this contract, combination and conspiracy they conceived a plan and design calculated to break down and destroy 'competition with other farm publications within said territory;' and that in order to effectuate that purpose they agreed upon a combination schedule of advertising rates for all their publications materially below the total of the separate rates of each." (Italics ours.)

The decisive allegation in this pleading is that which charges the doing of a thing declared unlawful by the Sherman Act, to-wit: the entering "into a contract, combination and conspiracy for the purpose of obtaining a monopoly of the farm paper business * * * 'within the territory covered' by their publications." Publication and circulation of these farm papers throughout the several states mentioned concededly was interstate commerce. The fact that such business included advertising at compensatory rates, contracts in reference to which were the means employed to effectuate the unlawful conspiracy, did not give interstate character to such contracts, even though between citizens of different states. We do not understand the opinion so to hold. Nor can we see the significance attached by plaintiffs to the court's mention of the farm paper business as including transportation between states of electrotypes to be used by the respondents in setting up advertisements. While not questioning the interstate character of such transportation, it was but an incident to the performance of the advertising contracts. Obviously, it seems to us, the transportation of these articles did not, in the court's mind, give decisive characterization as interstate commerce to the business involved, for at the very outset the court deduced that from the interstate circulation of the farm papers.

The transportation between states of the electrotypes falls within the distinction we draw between the case at bar and International Textbook Co. *v.* Pigg, also relied upon by plaintiffs. They argue that even if such a contract as that disclosed in the Blumenstock case be not deemed an interstate transaction, nevertheless, the interstate movement of advertising cuts, mats and copy con-

templated by their contracts with advertisers makes such contracts and the performance thereof interstate transactions within the doctrine of the Pigg case.

But there is this difference between the two cases. In the Pigg case the continuous movement of text books, apparatus, letters of instruction and the like entered into the very essence of the contract. That movement was in constant execution and fulfillment of the contract itself—not a mere preliminary act incident to preparing one of the parties for performance as in the instant case. If plaintiffs be correct in this contention, a building contract between *two residents of New Mexico* for construction of a building *in New Mexico* will take on the characteristics of interstate commerce and be subject to federal regulation by the mere circumstance that the contract calls for material of a certain kind whose purchase and delivery may involve a movement of goods in interstate commerce.

Furthermore, in view of the dismissal of the petition in the Blumenstock case for failure to state a cause of action for recovery of treble damages under the Sherman Act, we do not consider well founded plaintiffs' contention that advertising so promotes the sale of the goods advertised as to start their flow in interstate commerce, thereby characterizing same as an interstate transaction. Allegations of similar import appear in the petition in that case. This consideration seems too remote to be decisive and was evidently so considered by the court in the Blumenstock case.

The most that fairly can be said of the tax here imposed in its relation to plaintiffs' business, it seems to us, is that it indirectly affects interstate commerce. It is only such transactions as directly affect same and impose a direct burden thereon that fall within the interdiction of the commerce clause of the federal constitution. Schechter Poultry Corporation *v.* United States, 295, U. S. 495, 79 L. Ed. 1570, 97 A. L. R. 947, and cases cited. See also Carter *v.* Carter Coal Co., 298 U. S. 238, 80 L. Ed. 1160.

In the Schechter case, one ground urged in support of federal regulation of the live poultry industry of the metropolitan area in and about New York City was the power of Congress over interstate commerce. It was argued that

hours and wages affect prices; that payment of lower wages or reducing cost by exacting long hours would enable the operator in the industry so doing to sell at lower prices, since labor represents 50 to 60 per cent of these costs; that this practice results in a demand for a cheaper grade of goods; and that the cutting of prices demoralizes the price structure. Interstate commerce was thus brought in only upon the charge that violation of certain Code provisions regulating the industry—as to hours and wages of employees and local sales—"*affected*" interstate commerce.

Holding against the contention that the claimed violations directly "affected" interstate commerce, the court, among other things, said:

> "In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. Direct effects are illustrated by the railroad cases we have cited, as e. g., the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all interprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control."

At most, the tax challenged affects only indirectly the interstate business of plaintiffs. So does the property tax they pay on tangible property located in New Mexico; and as well the property tax paid by an interstate carrier on its property having permanent situs in the taxing state, even though employed in interstate transportation of freight and passengers. But no more in the one case than in the other does this indirect burden relieve such property from bearing its just share of state taxation.

That the legislature did not intend to transcend provisions of the commerce clause of the federal constitution is shown by express language of the act. Section 202 of Chapter 7 thereof reads:

> "None of the taxes levied by this act shall be construed to apply to transactions in interstate or foreign commerce, or commerce with Indian tribes."

We are convinced that the act in its application to plaintiffs imposes an unconstitutional burden on interstate commerce. Controlled as we are by decisions of the United States Supreme Court on such matters, we have carefully weighed decisions cited from that court and believe our conclusion in harmony with them.

It follows that the trial court erred in overruling the demurrer of the defendants. Accordingly, the judgment entered against them following their refusal to plead further will be reversed. The cause will be remanded to the district court of Santa Fe County with directions to sustain the demurrer and for further proceedings in conformity with the views herein expressed.

It is so Ordered.

DANIEL K. SADLER,
Justice.

We Concur:

ANDREW H. HUDSPETH,
Chief Justice.

HOWARD L. BICKLEY,
Justice.

CHARLES R. BRICE,
Justice.

A. L. ZINN,
Justice.

EXHIBIT "B".

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO.

No. 4310.

WESTERN LIVE STOCK, a Partnership Composed of Frasier Biggs and D. F. Biggs, *Plaintiffs and Appellants,*

vs.

BUREAU OF REVENUE, and JOHN A. BINGAMAN, Commissioner of Revenue, *Defendants and Appellees.*

Appeal from the District Court of Santa Fe County.

Chavez, Judge.

Filed May 10, 1937.

Reported at 67 P. (2d) 505, New Mexico Official Citation Unavailable.

Opinion.

Per CURIAM:

This is the second appeal of this case. For the facts see our former opinion, Western Live Stock *v.* Bureau of Revenue, 41 N. M. —, 65 P. (2d) 683. Broadly, but a single issue was presented on the former appeal, namely, whether C. 7, N. M. Session Laws of 1934 (Special Session), in its application to plaintiffs, operates as an unconstitutional burden on interstate commerce. We held that it does not, reversing the judgment in plaintiffs' favor by the district court of Santa Fe County, and remanded the cause to said court with directions to set aside its judgment and to sustain defendants' demurrer. "Interstate commerce" was put into the case through plaintiffs' claim that advertising contracts between them and out-of-state advertisers, and certain acts incident to performance of such contracts, constitute interstate transactions.

The district court of Santa Fe County, following the directions of our mandate, duly entered an order sustaining

defendants' demurrer. Thereupon plaintiffs filed a written declaration of inability to amend and of refusal to plead further. The district court then rendered judgment against the plaintiffs, dismissing their complaint with prejudice. They seek a review of that judgment by this appeal.

The matter is before us upon the former record and a new transcript supplementing same, showing the proceedings subsequent to mandate. The parties have stipulated that the briefs filed by counsel for the respective parties on the former appeal shall be considered by the court as their briefs on this appeal. We thus have before us the same question, presented on the same record (with the addition of the above mentioned proceedings subsequent to mandate contained in the new transcript) and the same briefs. Obviously, the issue thus presented is ruled and foreclosed by our decision on the former appeal. It follows that the judgment of the district court must be affirmed.

It is so Ordered.

ANDREW H. HUDSPETH,
Chief Justice.

DANIEL K. SADLER,
Justice.

CHARLES R. BRICE,
Justice.

A. L. ZINN,
Justice.

BICKLEY, J., being absent, did not participate.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 322

WESTERN LIVE STOCK, A PARTNERSHIP COMPOSED OF FRAZIER BIGGS AND D. F. BIGGS,

Appellant,

vs.

BUREAU OF REVENUE AND JOHN D. BINGAMAN, COMMISSIONER OF REVENUE,

Appellees.

BRIEF FOR APPELLANT

The opinions of the Supreme Court of New Mexico in the two appeals of this case are found reported in 41 N. M. 141, 65 P. (2) 863 and 67 P. (2) 505 (official citation unavailable).

Appellants have made the statement of jurisdiction required by Paragraph 1 of Rule 12.

STATEMENT OF CASE

Appellants publish a monthly livestock magazine at Albuquerque, New Mexico, known as "Western Live Stock." It has a general circulation in New Mexico and other states. (R. 1). One of its chief sources of revenue is advertising. Appellants solicit and publish, under contracts, advertise-

ments of products manufactured elsewhere than in New Mexico, such products to be sold, shipped and transported from the manufacturer to the customer. (R. 1, 2). These out-of-state or foreign advertisements are obtained by appellants both through personal solicitation by its own representatives, or through advertising agencies located in states other than New Mexico. Some advertising contracts are between appellants and the manufacturers themselves, others only with the advertising agencies. (R. 2).

In the preparation of the advertisements for insertion in appellants' magazine, all advertising material, copy, cuts, mats, etc., are sent to appellants by said foreign advertisers. (R. 2, 8). As part of the advertising contract, appellants must print the advertisements and distribute the magazines to their subscribers throughout the various states of the Union, before becoming entitled to payment from the foreign advertisers (R. 8).

Chapter 7 of the New Mexico Special Session Laws of 1934 (appearing at pages 11 to 33, inclusive, of the official report thereof) levies what is designated an "excise" or "privilege" tax, for the purpose of raising an "Emergency School Fund," and by Section 201, Subsection I, provides for the application of said tax to certain businesses as follows:

> "I. At an amount equal to 2% of the gross receipts of any person engaging or continuing in any of the following businesses: * * * publication of newspapers and magazines (but the gross receipts of the business of publishing newspapers or magazines shall include only the amounts received for the sale of advertising space) * * *." (R. 4).

Section 202 provides the tax shall not apply to transactions in interstate commerce. Other sections make it illegal to continue in business without payment of the tax, empower the taxing authorities to obtain distress warrants, restrain and enjoin further operations by a business delinquent in payment of the tax, etc.

Appellants filed suit to collect $80.27 paid under protest, representing two per cent (with penalties and interest) of the gross receipts derived from out-of-state advertising over a certain period, on the ground that said advertising and advertising contracts constituted interstate commerce, that said tax amounted to a direct and substantial burden thereon, and that accordingly said tax was repugnant to Article I, Section 8, of the Constitution of the United States. (R. 2, 4.)

Appellees demurred (R. 6, 7) and the District Court of Santa Fe County, New Mexico, overruled the demurrer and entered final judgment for appellants. (R. 9, 10.) On appeal, the Supreme Court of New Mexico reversed the lower court. (R. 19, 20.) On entry of the mandate of reversal in the lower court, appellants refused to plead further and stood on their amended complaint (R. 21) and final judgment was entered, dismissing appellants' cause with prejudice. (R. 22, 23.) Appellants appealed the cause, and the Supreme Court of New Mexico rendered its second opinion in the matter, affirming the lower court in dismissing appellants' action with prejudice. (R. 24.) On this record, this Court, on October 11, 1937, entered the following order:

> "Further consideration of the question of the jurisdiction of this Court in this case is postponed to the hearing of the case on the merits."

THE JURISDICTIONAL QUESTION

Appellants submit that the instant case falls directly and clearly within Section 237 of the Judicial Code, as involving a final judgment in a suit in the highest court of New Mexico, where is drawn in question the validity of a statute of New Mexico, on the ground of its being repugnant to the Constitution, and the decision is in favor of its validity.

Appellants seasonably, to-wit, in their first pleading in the record (R. 1) challenge the validity of the New Mexico Emergency School Tax Act (Chap. 7 N. M. Sp. Session

Laws of 1934) on the ground that it is repugnant to Article I, Section 8 of the Constitution of the United States, commonly known as the "commerce clause." (R. 2, 4). The highest court in New Mexico in which a decision could be had, to-wit, the Supreme Court of New Mexico (Constitution of New Mexico, Article VI, Sections 1 and 2) upheld the law, directly finding the same not to be unconstitutional as violating the "commerce clause" of the Federal Constitution. (R. 19, 23). The Court did not limit itself to deciding the application of the statute, although this itself would be sufficient. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239; *Eureka Pipe Line Company v. Hallanan*, 257 U. S. 265, 42 S. Ct. 101, 66 L. Ed. 227; *United Fuel Gas Co. v. Hallanan*, 257 U. S. 277, 42 S. Ct. 105, 66 L. Ed. 234. The case discloses a final judgment (R. 22, 23) and the State court sustained the statute (R. 19, 22, 23). We submit that the federal question presented is substantial and not frivolous. *Indiana Farmers' Guide Publishing Co. v. Prairie Farmers Publishing Co.*, 293 U. S. 268, 55 S. Ct. 182, 79 L. Ed. 356; *Fisher's Blend Station, Inc. v. Tax Commission of the State of Washington, et al.*, 297 U. S. 650, 80 L. Ed. 956, 56 S. Ct. 608.

Even if the cause were before the Court on a writ of certiorari, we submit that jurisdiction should be entertained because of the substantial federal question involved and the public interest in the decision. Twenty-two States of the Union have "sales" tax laws. Two States, New Mexico and Arizona, now tax newspaper advertising. (New Mexico Laws of 1935, Chap. 73; Laws of 1937, Chap. 192; Arizona Laws of 1935, Chap. 77.) Missouri did until 1934. Laws of Missouri, Extra Session, 1933-1934, Pp. 155-166. Five States tax newspaper subscriptions. (See bulletin 6649 and supplements issued by American Newspaper Publishers Association, 370 Lexington Ave., New York City.) With need for local revenue advancing rather than declining, it is likely that other States will attempt to tax advertising, and a decision on the question is one of national importance. *State v. Welsh*, 61 S. D. 593, 251 N. W. 189 at

197. No decision, state or federal, exactly in point, has been rendered.

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

Appellants rely upon the assignments of error set forth in their petition for appeal (R. 25) which may be summarized as follows, to-wit:

1. The Supreme Court of New Mexico erred in failing to hold that advertising appearing in newspapers and magazines having interstate circulation amounted to interstate commerce.

2. The Supreme Court of New Mexico erred in failing to hold that advertising and advertising contracts between appellants and the out-of-state advertisers, specifically stipulating for and necessarily involving the interstate transmission of advertising copy and materials, the printing of the magazines, their distribution and circulation to appellants' subscribers throughout various States of the Union, all being required before appellants became entitled to the consideration for said contracts, amounted to interstate commerce.

3. The Supreme Court of New Mexico erred in failing to hold that the advertisement of goods destined to move in interstate commerce, in newspapers themselves circulated beyond the boundaries of a State, constituted interstate commerce, and that the contracts for said advertising, which both stimulate and result in the interstate sale and shipment of said advertised goods in original packages, thereby become as definitely a part of interstate commerce as the transaction in the goods themselves.

4. The Supreme Court of New Mexico erred in failing to hold that the Emergency School Tax Act, Chapter 7 of the Special Session Laws of 1934, imposing a tax of 2% on the gross proceeds of appellants' adver-

tising from out-of-state advertisers, placed a direct, immediate and substantial burden on interstate commerce, and was thereby void as being repugnant to Article I, Section 8, of the Constitution of the United States.

SUMMARY OF ARGUMENT

1. Appellant's first point consists of an analysis of the Act in question and of the exact issue to be determined, to-wit: Does national advertising constitute a transaction in interstate commerce?

2. Newspapers and magazines circulating in various States of the Union are engaged in interstate commerce, and advertising therein necessarily becomes a part of interstate commerce.

Koneky v. Jewish Press, 288 Fed. 179.

Indiana Farmers Guide Publishing Co. v. Prairie Farmers Publishing Co., 293 U. S. 268, 55 Sup. Ct. Rep. 182, 79 L. Ed. 356.

Blumenstock Bros. Advertising Agency v. Curtis Publishing Co., 252 U. S. 436, 64 L. Ed. 649, 40 Sup. Ct. Rep. 385.

Post Printing & Publishing Co. v. Brewster, 246 Fed. 321.

State v. Salt Lake Tribune Publishing Co., 68 Utah 187, 249 Pac. 474, 48 A.L.R. 553.

Little v. Smith, 124 Kan. 237, 257 Pac. 959, 57 A.L.R. 100.

3. Advertising contracts providing for the interstate transmission of the advertising materials, and thereafter for the interstate transmission of the printed newspapers and magazines containing the advertising itself, are defi-

nitely instrumentalities of interstate commerce, and immune from direct interference by a State.

Indiana Farmers' Guide Publishing Co. v. Prairie Farmers Publishing Co., 293 U. S. 268, 55 Sup. Ct. Rep. 182, 79 L. Ed. 356.

International Text Book Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. Rep. 481, 54 L. Ed. 678.

Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. 1.

National Labor Relations Bd. v. Jones & Laughlin S. Corp., 301 U. S. 1, 57 Sup. Ct. Rep. 615, 81 L. Ed. 563.

4. The sale of products in the original package to purchasers residing in States other than where said products are originally manufactured or stored constitutes interstate commerce. Advertising by out-of-state advertisers, even in local newspapers and magazines, directly promotes, aids and results in the sale of such products, which are thereby transmitted in interstate commerce. Such advertising is an integral step in the interstate movement of the goods and definitely becomes an instrumentality and part of interstate commerce, and such advertising is immune from direct interference by a State. More so is this true where the advertising mediums have interstate circulation:

Post Printing & Publishing Co. v. Brewster, 246 Fed. 321.

State v. Salt Lake Tribune Publishing Co., 68 Utah 187, 249 Pac. 474, 48 A.L.R. 553.

Little v. Smith, 124 Kan. 237, 257 Pac. 959, 57 A.L.R. 100.

Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. 1.

5. Chapter 7 of the Special Session Laws of 1934, imposing a 2% tax on the gross proceeds of out-of-state and national advertising, (and making no provision for segregating local from foreign business), places a direct and sub-

stantial burden thereon, and is illegal as violating Article I, Section 8 of the Federal Constitution:

United States Glue Co. v. Town of Oak Creek, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135.

Fisher's Blend Station, Inc. v. Tax Commission of the State of Washington, et al., 297 U. S. 650, 56 S. Ct. 608, 80 L. Ed. 956.

Sprout v. South Bend, 277 U. S. 163, 48 S. Ct. 502, 72 L. Ed. 833.

Bowman v. Continental Oil Co., 256 U. S. 642, 41 S. Ct. 606, 65 L. Ed. 1139.

6. Every case advanced and relied on by appellees can be definitely and clearly distinguished from the case under consideration. The instant case falls exactly within the application of *Fisher's Blend Station, Inc. v. Tax Commission of the State of Washington*, 297 U. S. 650, 80 L. Ed. 956, 56 S. Ct. 608, decided March 30, 1936.

I.

ANALYSIS OF THE ACT IN QUESTION AND THE EXACT ISSUE TO BE DETERMINED

The New Mexico School Emergency Act of 1934 imposes a privilege tax measured by the amount or volume of business done against persons engaging in business within the State of New Mexico for the purpose of raising an "Emergency School Fund." Section 201, Subsection I, provides for the application of the tax to certain businesses, as follows:

> "I. At an amount equal to 2% of the gross receipts of any person engaging in or continuing in, any of the following businesses: * * * publication of newspapers and magazines (but the gross receipts of the business of publishing newspapers or magazines shall include

only the amounts received for the sale of advertising space) * * *"

The Constitution of the United States, in Article 1, Section 8, provides that Congress shall have power to regulate commerce among the several states. From this basic grant of power, the general principle has developed that in matters of interstate concern, the Federal Government has exclusive control and that the individual States cannot directly burden interstate commerce in any form, even by a tax on the privilege of carrying on interstate business. The Legislature of New Mexico recognized this constitutional limitation. Section 202 of the Act provides:

> "None of the taxes levied by this Act shall be construed to apply to transactions in interstate or foreign commerce, or commerce with the Indian tribes, which, under the Constitution of the United States, the State of New Mexico is prohibited from taxing."

It would appear, accordingly, that the problem of whether the tax in question amounts to a burden, direct or otherwise, on interstate commerce, need not be determined, since the very language of the Act exempts "transactions in interstate commerce." We can safely say that there is only one issue: Does "national advertising" constitute a transaction in interstate commerce? As a matter of precaution, however, appellants answer the possible implication raised by appellees' demurrer (R. 7) that the question of whether the tax is direct or indirect constitutes an issue in this cause, showing the tax to be very direct and substantial. See Point V hereinbelow.

By the term "national advertising" or "foreign advertising" appellants refer to advertising by advertisers residing and located in states other than New Mexico, who advertise in appellants' magazine products, manufactured or stored elsewhere than in New Mexico, to be sold, shipped and transferred direct from the said advertisers to the customer in the original packages as when manufactured. (R.

2). The by-word of "national advertising" is the stimulation of a demand in every State for the goods so transported between the States. An advertising program national in its scope contemplates the making of contracts with publishers in practically every state. It is the purpose of the advertiser to reach readers of any certain paper or magazine in all States in which it may circulate, as well as the State in which it is published. A "national advertising" campaign is in this day and age a necessary concomitant of the sale and shipment of goods in interstate commerce.

One other consideration is pertinent. There is no question presented of the police power of a State to prohibit, absolutely or partially (viz, by means of a tax), the publication or circulation of newspapers or magazines containing advertisements of goods, the importation or use of which is prohibited under State law. The Act taxes revenues from the advertising of all goods, which must necessarily include goods of lawful character. The Act is a revenue act pure and simple, and is not a police measure relating to public health, welfare or morals. See 48 A.L.R. 563.

We face the issue: Is national advertising interstate commerce? We answer this in the three succeeding paragraphs, considering the question from three different viewpoints, any one of which should be sufficient, and when considered together, in our opinion conclusively answers the issue in the affirmative.

II.

NATIONAL AND FOREIGN ADVERTISING APPEARING IN INTERSTATE NEWSPAPERS AND MAGAZINES CONSTITUTES INTERSTATE COMMERCE, PARTICULARLY WHERE THE ADVERTISING PROCESSES INVOLVE INTERSTATE TRANSACTIONS.

Koneky v. Jewish Press, 288 Fed. 179, 181, states:

"It may be conceded that the circulation of news-

papers throughout the country is interstate commerce."

What is the status of advertising in a newspaper or magazine having interstate circulation? This question was considered in the cases of *Post Printing & Publishing Co. v. Brewster* (1917), 246 Fed. 321; *State v. Salt Lake Tribune Publishing Co.* (1926), 68 Utah 187, 249 Pac. 474, 48 A.L.R. 553, and *Little v. Smith* (1927) 124 Kan. 237, 257 Pac. 959. 57 A.L.R. 100. All cases involved the constitutionality of State statutes prohibiting the advertising of cigarettes. The newspapers in question had circulation extending into various States of the Union, and contended that the statutes burdened interstate commerce. In all cases the Court ruled in favor of the newspapers, thoroughly emphasizing that the advertising of interstate business makes that advertising of itself interstate commerce. *Post Printing & Publishing Co.,* supra, in discussing advertising, makes this pronouncement (246 Fed. l.c. 326):

> "The sale of cigarettes in the State of Missouri, where the newspapers of plaintiff are published, is lawful business, and the transmission by plaintiff of the intelligence where and on what terms cigarettes may be purchased by its subscribers, by way of advertisements inserted in such newspaper, is perfectly legitimate and proper. * * * the business of advertising such interstate commerce business, which advertising itself not only is a form of interstate commerce, but further adheres in the very conduct of the interstate cigarette business itself, is also beyond the power of the State to prohibit or make criminal and punish, * * *"

State v. Salt Lake Tribune Publishing Co., reasons as follows (249 Pac. at 476):

> "If it is lawful, therefore, to deal in and to sell cigarettes, why is it not lawful to inform those who may legally purchase an article where they may do so?

> "The conclusion therefore seems irresistible that, in view that the advertisement published by the Salt Lake Tribune in and of itself constitutes interstate commerce with which the State of Utah could not interfere, and further, that the article likewise was protected both by the laws of Utah permitting its sale and to the extent that the article was shipped into the State in original packages was also protected from interference by the State, the defendant was clearly within its legal rights in publishing the advertisement, and that the statute in question constitutes an undue interference with interstate commerce and therefore cannot be upheld."

Little v. Smith, supra, expresses its position in this language (257 Pac. at 961-962):

> "Advertisements of goods in interstate commerce is an aid to the sale and must be regarded as an essential part of the business. * * *
>
> "Newspapers and other media of conveying information regarding proper subjects of interstate commerce must be deemed to be engaged in such commerce. Cigarettes transported from other States, sold in original packages, is commerce, and contracts for advertising and the newspapers themselves carrying such information and advertisements, in order to promote sales, are within the protection of the commerce clause of the Constitution."

Two cases of the United States Supreme Court demand our attention, to-wit: *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U. S. 436, 40 S. Ct. 385, 64 L. Ed. 649; and *Indiana Farmers' Guide Publishing Co. v. Prairie Farmers Publishing Co.*, 293 U. S. 268, 55 S. Ct. 182, 79 L. Ed. 356.

The former case, decided in 1920, is an action under the Sherman Anti-Trust Act brought by an advertising agency

against the Curtis Publishing Company because of the latter's refusal to enter into a contract for the insertion of advertising matter in certain of its periodicals. The Curtis Publishing Company defended on the ground that its dealings were not transactions of interstate commerce and the United States Supreme Court so held, stating (252 U. S. at 442):

> "It may be conceded that the circulation and distribution of such publications throughout the country would amount to interstate commerce, but the circulation of these periodicals did not depend upon or have any direct relation to the advertising contracts which the plaintiff offered and the defendant refused to receive except upon the terms stated in the declaration. The advertising contracts did not involve any movement of goods or merchandise in interstate commerce, or any transmission of intelligence in such commerce."

In the *Indiana Farmers' Guide* case, decided in 1934, seven newspaper companies combined for the purpose of controlling advertising in certain mid-western States by means of offering a combination rate with which plaintiff, another newspaper, could not afford to compete. Plaintiff filed suit under the Sherman Anti-Trust Act and again the question was presented as to whether or not this combination to control advertising amounted to interstate commerce. The Court held that it did, stating (293 U. S. at 276):

> "The business that is here alleged to have been damaged is the publication and circulation of these farm papers. That business includes the obtaining of advertising, the transportation between States of electrotypes sent respectively to petitioner and respondents by their customers to be used in setting up advertisements and the transportation of substantial quantities of the papers in interstate commerce. *Advertising at compensatory rates is an essential element.* The opinion in Blumenstock Bros. Adv. Agency v. Curtis Pub. Co., 252 U. S. 436, 64 L. Ed. 649, 40 S. Ct. 385, supra,

assumed that a publishing business such as that now under consideration would amount to interstate commerce. There is no ground for the contention that the evidence in this case is not sufficient to go to the jury on the question of interstate commerce." (Italics supplied.)

Appellees rely on the *Blumenstock* case to support the validity of the New Mexico statute here assailed. We submit that the above quotations from the *Blumenstock* case and *Farmers' Guide* case themselves point out the distinction. The *Blumenstock* case involves a single item—the refusal to make a contract, having no direct relation to interstate commerce. The defendant refused to take the first step toward the ultimate movement of the goods advertised in interstate commerce. The act of which the plaintiffs complained lay at the very threshold of the business transactions which should give to the dealings between the parties an interstate character. On the other hand, the tax sought to be imposed by the New Mexico law is only upon the revenue to be derived from the completed act of advertising, at the behest of non-resident advertisers, of goods destined to move in interstate commerce, in papers themselves circulated in interstate commerce. It is similar to the situation in the *Farmers' Guide* case. We are not confined to the narrow feature of a single isolated contract—or lack of contract—but consider the broad service of advertising, with all its concomitants, relationships, and consequences. In the *Farmers' Guide* case, the Court, of necessity, had to answer this question: "Is advertising by national advertisers interstate commerce?" The Court answered in the affirmative.

It would appear, therefore, that the courts have authoritatively held that national advertising appearing in an interstate newspaper or magazine is itself interstate commerce.

III.

ADVERTISING CONTRACTS PROVIDING FOR INTERSTATE TRANSMISSION OF ADVERTISING MATERIALS AND THEREAFTER FOR INTERSTATE CIRCULATION OF FINISHED PRODUCT ARE UNDOUBTEDLY INTERSTATE COMMERCE.

In the instant case, appellants specifically allege that their advertising contracts provide for and necessarily involve the interstate transmission of the advertising materials and thereafter for transportation of the magazines in interstate commerce, all prior to completion of the contracts and payment of the revenue for said advertising. (R. 8). This is exactly the situation presented in *Indiana Farmers' Guide Publishing Co. v. Prairie Farmers Publishing Co.*, supra. Further elaboration is unnecessary.

In *International Text Book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. Rep. 481, 54 L. Ed. 678, the Text Book Company was a foreign corporation which, through agents maintaining their offices in the State of Kansas, had entered into contracts with students in said State by which sums of money as tuition were collected from the Kansas students and sent to the text book company in Pennsylvania, the latter then forwarding texts, questionnaires, pamphlets and papers to the students, which, however, were not sold, but only loaned during the course of instruction and returned eventually to the company. The Court held that the negotiation of the contract and the transportation of the books, pamphlets and correspondence between the parties all constituted transactions of commerce between the States and were not subject to burden of restriction by the State of Kansas.

In *Butler Bros. Shoe Co. v. U. S. Rubber Co.*, 156 Fed. 1, the Rubber Company, a New Jersey corporation, pursuant to a written agreement with the Shoe Company, a Colorado firm, supplied goods upon consignment. The Rubber Company later filed suit in the Colorado courts against the

local firm without having qualified as a foreign corporation, and its right to sue was challenged. The federal court, however, held the foreign corporation to be engaged in interstate commerce and entitled to sue. Judge Sanborn stated (156 Fed. at 17):

> "Importation into one State from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce.
>
> "The contracts before us constituted and caused commercial intercourse between citizens of different states. Their chief purpose and their principal effect were the importation of sound articles of commerce into the state of Colorado from other states and they necessarily constituted transactions in interstate commerce."

While we recognize that what constitutes commerce for purposes of regulation may not constitute commerce for purpose of taxation, we still submit that the reasoning in *National Labor Relations Board v. Jones and Laughlin Steel Corporation,* 301 U. S. 1, 81 L. Ed. 563, 57 Sup. Ct. Rep. 615, and companion cases, is logically sound and adds impetus to the fact that even in tax problems, activities analogous to those under consideration should be deemed interstate commerce.

We submit that the appellants' contracts are equivalent to those considered in the *Indiana Farmers' Guide, International Text Book Co.,* and *Butler Bros. Shoe Company* cases, supra, thus affording further and independent grounds for our main contention that the advertising under consideration, and contracts for the same, constitute interstate commerce.

IV.

THE ADVERTISEMENT OF GOODS DESTINED TO MOVE IN INTERSTATE COMMERCE, IN NEWSPAPERS THEMSELVES CIRCULATING BEYOND THE BOUNDARIES OF A STATE, CONSTITUTES INTERSTATE COMMERCE.

This point is irrevocably connected with our Points II and III, and all points could have been well combined under one heading. Perhaps the segregation we offer makes for clearer analysis. The cases discussed under Points II and III are singularly applicable here, and without rediscussing said cases, we resubmit them to the consideration of the court.

Aside from these authorities, we call attention to two persuasive analogies which indicate the inability of a state to tax the business of circulating intelligence, information and advertising, or the business of soliciting a demand for products which may later move in interstate commerce through other means than by advertising.

The first analogy is to the telegraph, telephone and radio cases.

The early case of *Paul v. Virginia* (1869), 19 L. ed. 357, held the issuance of a policy of insurance, although between citizens of different states, not to be a transaction of commerce. One of the grounds for the decision was that insurance contracts were not commodities which might be called "goods" as the court understood that term. The court was confronted with this decision a few years later in considering the power of a state to grant an exclusive franchise within the state for the transmission of telegraphic messages, and promptly enlarged its definition of commerce to keep up with the times. *Pensacola Telegraph Co. v. Western Union Telegraph Co.* (1877), 96 U. S. 1. See also *Western Union Telegraph Co. v. Pendleton* (1887) 122 U. S. 347.

And in *Telegraph Co. v. Texas* (1881) 105 U. S. 460, the

court invalidated a tax on messages directed to points outside the state. The principle has been expanded until there is no doubt at this date that a State cannot in any way directly interfere, by taxation or otherwise, with the business of the interstate transmission of telegraph and telephone messages. *Leloup v. Port of Mobile,* 127 U. S. 640; *Ratterman v. Western Union Telegraph Co.,* 127 U. S. 411; *Western Union Telegraph Co. v. Alabama,* 132 U. S. 472; *Western Union Telegraph Co. v. Kansas,* 216 U. S. 1; *Cooney v. Mountain States Tel. & Tel. Co.,* 294 U. S. 384.

The radio cases are even stronger. In *Station WBT, Inc. v. Poulnot,* 46 Fed. (2) 671, the court invalidated a South Carolina statute imposing a tax on radio receiving sets, holding them to be instrumentalities of interstate commerce. In 1933 the State of Washington passed a privilege tax very analogous to the New Mexico act under consideration, levying a one percent tax on the gross income from radio broadcasting. Washington Laws of 1933, Chapter 191, Section 2(2). This statute was challenged both in the lower federal and state courts. The lower federal court held the statute invalid. *KVL, Inc. v. Tax Commission of Washington,* 12 F. Supp. 497. The lower state court held likewise, but the State Supreme Court reversed this decision, holding the statute valid. *Fisher's Blend Station, Inc. v. Tax Commission of Washington,* 45 Pac. (2) 942; 49 Pac. (2) 1151. The latter case was taken to the United States Supreme Court, which on March 30, 1936, reversed the state court, and held the statute invalid, 297 U. S. 650, 56 S. Ct. 608, 80 L. ed. 956. We submit that this decision is one of the strongest authorities appellants can submit to sustain their position. Comparison of the New Mexico and Washington acts shows them to be identical in most respects. Hence, the case merits careful attention. In *Fisher's Blend Station, Inc. v. Tax Commission of Washington,* supra, appellants maintained two broadcasting stations, broadcasting over an area embracing several states, Alaska and Hawaii. Appellants' entire income was derived from advertisers who desired the broadcasts to reach the listening public in the areas which appellants covered, including nat-

urally many persons in other states. The tax was challenged as constituting a burden on interstate commerce. The Washington Supreme Court found the business to be entirely intra-state, and the tax on revenue too remote and incidental to affect appellants' interstate activities, if any. But the United States Supreme Court held otherwise, stating (80 L. ed. at 960):

> "The essential purpose and indispensable effect of all broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. It is that for which the customer pays. By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause. . . ."

The ready adaptation by the United States Supreme Court of its technical definition of interstate commerce as the transportation of commodities or goods, to the transmission of intelligence by telephone, telegraph and radio, gives a clear basis for the argument that the transmission of intelligence regarding the merits of commodities moving in interstate commerce itself constitutes commerce of that character. This is particularly true, in view of the fact that the holdings in these cases prohibit taxation by a state on the privilege of engaging in such businesses, because they were found to be interstate in their nature. We submit, however, that in said cases, the interstate commerce is of but a potential character; that is, state taxation is prohibited because messages of this character may and readily do cross state boundaries. The reasoning of these cases is more clearly applicable to the prohibition of state taxation on revenues derived from national advertising, since they are imposed on the fruits of the transmission of commercial intelligence across state boundaries, when that interstate transaction has become an accomplished fact, transcending the bounds of a mere interstate potentiality.

The second analogy to which we refer is the personal so-

licitation of trade, resulting in the transmission of goods across state boundaries. The law is well established that a state may not tax persons taking orders in one state for delivery of the products from another. *Robbins v. Shelby County Taxing District*, 120 U. S. 489; *McCall v. California*, 136 U. S. 104. We refer the Court to the language of these decisions, as being clearly applicable to the questions presented by present-day advertising, which has largely displaced the need for personal solicitation by representatives selling their goods in interstate commerce. National advertising of the type appearing in appellants' magazine is but the modern form of solicitation of prospective purchasers of the goods advertised. It is visual salesmanship, as contrasted with aural salesmanship by drummers; it is a sale by pictorial sample rather than by actual sample exhibited to the prospective purchaser. The doctrine of the *Robbins* and *McCall* cases finds direct application, especially since in newspaper advertising, the solicitation of sales, through presentation of the merits of a product which may later move across state boundaries, is made contemporaneously in several states. Under the doctrine of these cases, the State of New Mexico cannot constitutionally impose an excise tax on the privilege of selling goods in New Mexico and other states through visual presentation of them in advertisements contained in magazines or newspapers circulating in these states.

In concluding our argument on the main issue presented, we submit that the foregoing authorities conclusively establish that the advertising by advertisers and manufacturers residing outside of New Mexico, of goods destined to move into it and other states, in newspapers and magazines published in New Mexico, and circulated beyond its boundaries, constitutes interstate commerce, especially where the advertising contracts provide for the interstate transmission of the advertising materials and information. We further conclude that since the New Mexico School Emergency Tax Act of 1934 by its own terms excepts transactions in interstate commerce, that said Act can have no application and is illegal as applied to appellants' national advertising.

V.

THE NEW MEXICO SCHOOL EMERGENCY TAX ACT OF 1934, LEVYING A 2% TAX ON THE GROSS PROCEEDS OF APPELLANTS' NATIONAL ADVERTISING, IMPOSES A DIRECT BURDEN ON INTERSTATE COMMERCE AND IS UNCONSTITUTIONAL.

Appellees imply that in spite of the language of Chapter 7, New Mexico Special Session Laws of 1934, Section 202, excepting transactions in interstate commerce, that the tax is still valid since it affects only the revenue from advertising and constitutes only a remote and indirect burden, if at all, on interstate commerce. While we do admit the correctness of this implication, we answer the question to foreclose any doubt about the matter.

Where the taxing act is silent on the question, the rule is clearly established that for a state tax on interstate commerce to be invalid, it must constitute a direct, substantial and immediate burden thereon, as distinguished from an indirect, unsubstantial or incidental burden. 12 C. J. Par. 126, Page 96. A tax on gross receipts derived from interstate commerce is considered a direct burden, while a tax on net receipts is deemed an indirect and inconsequential burden.

The rule is well stated in *United States Glue Co. v. Town of Oak Creek,* 247 U. S. 321, 38 Sup. Ct. 499, 62 L. Ed. 1135 at 1141:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Con-

> ceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce."

Our first inquiry, then, is whether the tax in dispute is one on gross receipts. This is undisputed. (Section 201, Chapter 7, Sp. Sess. L. of 1934.) "Gross receipts" is defined by Section 3 of the Act as total receipts of the taxpayer "without deduction on account of losses or expenses of any kind." Nothing in the act indicates the tax is on other than gross receipts. Accordingly, the act falls specifically within the principle of the *United States Glue Co.* case, and our inquiry on this phase is concluded.

Cases advanced by appellees indicate they rely on the theory that the tax is not on advertising directly, but on the privilege of publication, an intrastate function, with the measure of that privilege the proceeds from advertising; that accordingly, the burden is indirect and remote, and the tax legal. We submit this is exactly the theory of the Supreme Court of the State of Washington in *Fisher's Blend Station v. Tax Commission of Washington,* 45 Pac. (2) 942. However, the Supreme Court of the United States, in reversing the decision, promptly overruled that theory, saying (80 L. ed. at 960):

> "As appellant's income is derived from interstate commerce, the tax, measured by appellant's gross income, is of a type which has long been held to be an unconstitutional burden on interstate commerce. Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200, 7 S. Ct. 1118, 1 Inters. Com. Rep. 308; Leloup v. Mobile, 127 U. S. 640, 32 L. Ed. 311, 8 S. Ct. 1380, 2 Inter. Com. Rep. 134; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. Ed. 1031, 28 S. Ct. 638; Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 62 L. Ed. 295, 38 S. Ct. 126. . . ."

Once the question of interstate commerce was determined, the United States Supreme Court was not long troubled

over the question of the directness of the burden imposed by the tax. We again emphasize the importance of this decision, because of the close similarity between the Washington and New Mexico taxing acts. Neither the state nor federal decisions quote the exact language of the Washington act, but reference to the original sources is enlightening. Compare Washington Laws of 1933, Chapter 191, Section 2(2),-(ed), and New Mexico Sp. Sess. Laws of 1934, Chapter 7, Section 201 (G), (H).

Again, further analysis of the act discloses the fallacy of appellees' theory. The New Mexico School Emergency Tax Act of 1934 attempts to embrace the entire sphere of business activities in the State of New Mexico (Sec. 201), with certain named exceptions (Sec. 212). The measure of the tax in all instances is gross receipts or gross proceeds. It is illegal to absorb the tax, but it must be passed on to the ultimate consumer (Sec. 204). As a practical matter, the tax is not on the privilege of engaging in business, but upon the sale or transaction itself. Applied to the instant case, the tax is not on the privilege of publishing a magazine, but directly on the *advertising*. The tax is not a privilege tax, but more nearly a general sales tax. See *State v. Welch*, 61 S. D. 593, 251 N. W. 189 at 196.

Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295, involved a Pennsylvania statute imposing on wholesale vendors of goods, a license tax, partly fixed by a standard price, and partly by gross volume of annual business. In determining defendant's tax, the amount received from sales outside the State were considered. The Court held the fixed fee valid, but held the other invalid, stating, (62 L. Ed. at 298):

> " . . . but the additional imposition of a percentage upon each dollar of the gross transactions in foreign commerce seems to us to be, by its necessary effect, a tax upon such commerce, and therefore a regulation of it.
>
> "The tax now under consideration . . . bears no sem-

> blance of a property tax, or a franchise tax in the proper sense; nor is it an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise. *It operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the state, a part of every dollar received in such transactions.*" (Italics supplied.)

In *Brown v. Maryland,* 12 Wheat. 419, 6 L. Ed. 678, in holding a tax on the occupation of an importer invalid under the commerce clause, the court states, (p. 444):

> "It is impossible to conceal from ourselves that this is varying the form without varying the substance .... All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

Cook v. Pennsylvania, 97 U. S. 566, 24 L. Ed. 1015, holds a tax on the amount of an auctioneer's sales a tax on the goods sold. *Panhandle Oil Co. v. Mississippi,* 277 U. S. 218, 72 L. Ed. 857, 48 S. Ct. 451, decides a privilege tax imposed on sellers of gasoline, fixed at so many cents per gallon sold, is a tax on sales. See also *Indian Motorcycle Co. v. United States,* 283, U. S. 570, 75 L. Ed. 1277, 51 S. Ct. 601.

In conclusion, it is submitted that the foregoing authorities establish that the tax under consideration, irrespective of the exception contained in the taxing act, would constitute a direct and immediate burden on interstate commerce.

VI.

APPELLEES' CASES DISTINGUISHED

Appellees, to sustain their contentions, have first cited and relied upon five decisions of the United States Supreme Court which should be carefully analyzed to determine whether they support the conclusions arrived at.

Paul v. Virginia (1869) 8 Wall. 168, 19 L. ed. 357, and *Hooper v. California* (1894) 155 U. S. 648, 39 L. ed. 297, held the making of insurance contracts not to be transactions in interstate commerce although between citizens of different states. These cases are clearly distinguishable. The fact that appellants' contracts are between citizens of different states is not the ultimate fact in our case, but rather just the beginning, and one of the many elements which considered together show a transaction in interstate commerce. In *Paul v. Virginia* and *Hooper v. California*, the court considered only the *making* of a contract which was to be performed only at some indefinite date in the future when a casualty might occur, and then within the state where the contract was made.

Williams v. Fears (1900), 179 U. S. 271, 46 L. ed. 186, sustained a tax on employment agents, although the laborers employed might go outside the state. The case does not show that Williams actually negotiated any contracts with laborers. The insurance decisions are relied on. *Ware and Leland v. Mobile County* (1908) 208 U. S. 405, 52 L. ed. 885, upholds a tax on the business of buying and selling cotton futures. The facts show that only in rare instances was actual delivery of cotton made, and then from warehouses in the cities where the purchase and sale made, or possibly by shipment from Alabama. The court, relying on the insurance decisions, emphasized the fact there was no contractual obligation on the seller of cotton to ship it from a point in Alabama to another state in performing the contract, nor was there necessarily any movement of commodities in interstate traffic. The facts of our case contrast sharply

with these. Compare *Di Santo v. Pennsylvania,* 273 U. S. 34, 71 L. Ed. 524, 47 S. Ct. 267; *Furst v. Brewster,* 282 U. S. 418, 75 L. Ed. 478, 51 S. Ct. 295; *Lembke v. Farmers Grain Co.,* 258 U. S. 50, 66 L. ed. 458, 42 S. Ct. 244.

Appellees' quotation from *Anderson v. U. S.* (1898), 171 U. S. 604, 43 L. Ed. 300, is inappropriate, since the court was not required to decide the question of interstate commerce, and the pronouncement is mere dictum. Even there, interstate commerce was involved only in so far as a refusal to do business was concerned.

Compare these five decisions with the facts of the instant case. None went beyond the mere making of a contract, and the movement of goods or persons was remote in the extreme. In our case, the advertising contract, between citizens of different states, is clearly induced by the extent of appellants' circulation and distribution into both New Mexico and in other states of the Union. (R. 2, 8). The contract requires the interstate movement of the advertising materials and other means of producing the advertisements. (R. 8). Immediately on publication, the magazines are directed into channels of interstate and intrastate commerce. The advertisements carried therein are an inextricable part of the national sales programs of national advertisers, and stimulate the demand for the goods advertised and cause interstate movements therein. Upon publication and circulation, payment by the advertiser is likewise made across state boundaries. (R. 8). This chain of events is widely different from the mere making of, or refusal to make, a contract of the nature considered in the five cases above reviewed. No national advertiser would utilize appellants' magazine if it were to be held in the press rooms, instead of being immediately directed into interstate circulation. The tax in issue is not upon the mere making of a contract—it is one upon the accomplished fact of publication and circulation within and without the state of New Mexico.

Appellees discuss the cases of *Little v. Smith,* and *State v. Salt Lake Tribune Publishing Co.,* supra, cases on which

we distinctly rely to support our contentions. (Pages 11, 12, supra). Appellees would glean therefrom a theory that merely taxing revenue makes the controlling distinction. We have already answered this theory. See pages 22 to 24 supra. Next appellees rely on *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, also heretofore distinguished at pages 12 to 14 hereof.

Appellees' reliance on cases involving state franchise, license, privilege and income taxes prove nothing. These cases recognize and apply the rule heretofore stated (pages 21-22) that a tax on gross receipts is considered a burden on interstate commerce, and a tax on net receipts otherwise. However complex the facts in these cases, the formula remains the same. The excellent annotation at 105 A. L. R. 11-67 classifies most of the cases on which appellees rely, leaving undisturbed our contention that if the directness of the tax be an issue, the same is present. (Particularly, see 105 A.L.R. at 26, 27, 29, 34, 49, 52 and 63.)

In conclusion, we make this observation: Both parties have resorted to analogous situations found in decisions involving the Sherman Anti-Trust Act, state statutes prohibiting advertisement of cigarettes, insurances cases, federal regulatory measures, the right of foreign corporations to sue in state courts, state franchise, license, privilege and income taxes, etc. Appellants have submitted two further analogies—those of personal solicitations by non-residents, and the telegraph, telephone and radio cases. We again re-emphasize that in our opinion the closest analogy and the strongest precedent for our position is found in the United States Supreme Court's decision of *Fisher's Blend Station v. Tax Commission of Washington* (1936), supra, the single precedent offered by either side involving a state occupation tax measured by gross receipts from interstate business. As in the *Fisher's Blend* case, the New Mexico tax is not levied on the local activity—there the generation of electro-magnetic waves, here the running of a printing press and the publication of a magazine—but on the gross receipts for the service performed—there both the genera-

tion of the energy and the transmission of radio waves as a means of potential communication interstate, here the publication of a magazine and the transmission thereof as a means of undoubted communication interstate.

WHEREFORE, appellants pray that the judgment of the Supreme Court of the State of New Mexico be reversed.

Respectfully submitted,

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FILE COPY

IN THE

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OCTOBER TERM, 1935

No. 322

WESTERN LIVE STOCK, A PARTNERSHIP COMPOSED OF FRAZIER BIGGS, AND D. F. BIGGS, PLAINTIFF,
Appellant

vs.

BUREAU OF REVENUE AND JOHN D. BINGAMAN, COMMISSIONER OF REVENUE, DEFENDANTS,
Appellees.

BRIEF ON BEHALF OF APPELLEE

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IN THE

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No. 322

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Appellant

vs.

BUREAU OF REVENUE AND JOHN D. BINGAMAN, COMMISSIONER OF REVENUE, DEFENDANTS,
Appellees.

BRIEF ON BEHALF OF APPELLEE

APPELLEE'S STATEMENT OF THE CASE

On November 14th, 1935, the plaintiff, appellant here, filed an amended complaint in the District Court of Santa Fe County, New Mexico, against the Bureau of Revenue wherein it was sought to recover certain Emergency School Taxes theretofore paid under protest (R-1). Defendant, Appellee here, demurred (R-6) to the amended complaint and argument was had thereon on the 15th day of February, 1936, whereupon the court overruled the demurrer and upon refusal of defendant to plead further entered final

judgment on February 20th, 1936 (R-9). From said final judgment defendant appealed to the Supreme Court of this State and upon hearing the judgment was reversed. (R-19.) Upon entry of the Mandate of Reversal in the lower court appellants refused to plead further, (R-21) stood upon their amended complaint, and final judgment was entered dismissing appellant's cause with prejudice (R-22). Appellant again appealed and the Supreme Court of New Mexico rendered its second opinion affirming the lower court in dismissing appellant's action with prejudice (R-23). Thereupon, appellant, Western Livestock, sought an appeal to the Supreme Court of the United States (R-24) and the matter is now before this court for hearing thereon (R-26).

STATEMENT OF FACTS

Appellee accepts appellants' statement of facts, which is detailed in its brief under the heading "Statement of the Case", but for the convenience of this court we desire to supplement as follows:

The amended Complaint, (R-1), together with the amendments by interlineation to same, will henceforth be designated herein as the Complaint, and these Pleadings correctly state the facts which briefly may be summarized as follows:

The plaintiff is a partnership with its principal office and its place of business in Albuquerque, New Mexico; the defendant, Bureau of Revenue, was created by Chapter 9, Laws of 1935, of New Mexico (App. B), and is vested with the power and charged with all duties conferred and imposed upon the State Tax Commission by the Emergency School Tax Act, which is Chapter 7 of the Special Session Laws of 1934 (App. A).

The plaintiff is the owner and publisher of a magazine, which is prepared, edited and published in Albuquerque, New Mexico; this magazine has a general circulation and distribution throughout the State of New Mexico and other states, and is distributed by mail.

The magazine receives and publishes, under contracts, advertisements of products which are manufactured elsewhere than in New Mexico, such products to be sold, shipped and transported from the manufacturer to the customer. These foreign advertisements are obtained by plaintiff both through personal solicitation on the part of plaintiff, and through what is known as advertising agencies, located in states other than New Mexico. Some of these advertising contracts are made between plaintiff and the manufacturer, located in a foreign state, while others, as stated, are made between the plaintiff and an advertising agency, such advertising agency having a different and separate contract with the manufacturer and in such cases all dealings, in connection therewith, are between the plaintiff and the agency.

In the preparation of the advertisements for insertion in the plaintiff's magazine, certain advertising cuts, mats, material, information, intelligence and copy, are sent to plaintiff by said foreign advertisers, and plaintiff receives compensation pursuant to the contract to carry the advertising from such foreign advertisers, and it is upon the receipts derived by plaintiff from such advertising contracts that the tax herein under consideration is imposed.

All facts are more completely detailed, as stated, in the Complaint.

SUMMARY OF APPELLANTS' ARGUMENT

The demurrer filed in this cause (R-6) raises two main legal questions, which appear in order therein, and which are as follows: paragraphs 1, 2 and 3 of the demurrer raise the question that the advertising contracts constitute neither transactions in interstate commerce, nor instrumentalities thereof; paragraph 4 of the demurrer raises the question that even though the transactions constitute interstate commerce, nevertheless such transactions are not shown to be of the class exempted from taxation under the Constitution of the United States and of this state, these being direct and substantial burdens upon interstate commerce.

To summarize, it will be seen that we contend first; that the *contracts* for this so-called national advertising do not constitute transactions in interstate commerce, and that the tax upon the revenues derived therefrom is validly imposed as being within the taxing power of the state. Second, that even if these contracts were interpreted to be transactions in interstate commerce, or, if they are instrumentalities thereof, still they are not within the protection of the commerce clause of the Federal Constitution.

The taxation in this case can at most only *incidentally, indirectly, remotely,* and *unintentionally* affect interstate commerce and imposes no direct or substantial burden thereon.

The contract, as we view it, may be the means of leading to and causing a transaction in interstate commerce in that a reader of the advertisement may desire to purchase a quantity of cigarettes, the shipment of which would constitute interstate commerce, but the means only remotely affects interstate commerce. The result might well be termed speculative. The contract itself only incidentally affects interstate commerce and the contract itself, in view of all the foregoing, is, in our opinion, not a transaction in interstate commerce.

Therefore, *revenues* derived from such contracts may be taxed by the state and the same would be true even though such contracts may be deemed to be instrumentalities of interstate commerce, as the imposition of the tax neither imposes a direct or substantial burden upon same nor unduly interferes with it but only incidentally and remotely affects such interstate commerce.

APPELLEES' ANSWER TO APPELLANTS' POINTS II, III, IV, V.

A.

THE CONTRACTS ARE NOT TRANSACTIONS IN INTERSTATE COMMERCE

That newspapers published in one state and transported across the boundary line into and through other states is

a part of interstate commerce cannot be denied, but we are not concerned with this question.

The tax assailed is imposed by Section 201 of Chapter 7, Special Session Laws of 1934, (App. A) which reads as follows:

> "There is hereby levied, and shall be collected by the Tax Commission, privilege taxes, measured by the amount or volume of business done, against the persons, on account of their business activities, engaging, or continuing within the State of New Mexico, in any business as herein defined, and in the amounts determined by the application of rates against gross receipts, as follows:"

As applicable to plaintiffs the measure of the tax is prescribed by sub-paragraph I of Section 201, (App. A) reading:

> "At an amount equal to 2% of the gross receipts of any person engaging or continuing in any of the following businesses: * * * * publication of newspapers and magazines (but the gross receipts of the business of publishing newspapers or magazines shall include only the amounts received for the sale of advertising space) * * * *"

Article I, Section 8 of the Federal Constitution is commonly known as the "Commerce Clause" of the Constitution and it provides, in brief, that the Federal Congress shall have the power to regulate commerce with foreign nations and among the several states and with the Indian tribes. As a general rule, it may be stated broadly that the states have no power to regulate, burden or interfere with interstate commerce and that its regulation is left exclusively to the Federal Congress.

The legislature of the State of New Mexico recognized this principle when it considered and enacted the sales tax

law as is shown by Section 202 of said Chapter 7, (App. A) said section being as follows:

> "None of the taxes levied by this act shall be construed to apply to transactions in interstate or foreign commerce, or commerce with Indian tribes . . ."

Section 206 of said Chapter (App. A) also reveals that the legislature recongized this principle and shows that the legislature intended to prevent and avoid contravention of the commerce clause of the Federal Constitution, and this section provides for the determination by the Tax Commission of the value of products "when transported out of the state and before they enter interstate commerce."

One of the historic opinions of the Supreme Court of the United States was that decided in 1869 and entitled *Paul v. Virginia,* cited in 19 L. Ed. 357, 8 Wall. (75 U. S.) 168.

The opinion in *Paul v. Virginia* was delivered by Mr. Justice Field, and was one of the first cases which took into consideration the question of contracts made by citizens of different states. The contract in this case was a contract of insurance, and without discussing the facts involved, we desire to call attention to that part of the opinion wherein the court said:

> "There is, therefore, nothing in the fact—that the insurance companies of New York are corporations—to impair the force of argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire entered into between the corporations and the assured for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word . . . they are not commodities to be shipped or forwarded from one state to another and then put up for sale. They

> are like other personal contracts between the parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions though the parties may be domiciled in different states. . . they do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

Apparently, under this decision, the court considered a contract of insurance as being one which rested upon the same basis and subject to the same legal principles as other contracts between citizens of different states.

In *Williams v. Fears*, 45 L. Ed. 186, 179 U. S. 270, 21 S. Ct. 128, we find an interesting opinion by Mr. Chief Justice Fuller. That case involved the right of the State of Georgia to impose a license tax upon agents who are engaged in the occupation of hiring laborers in the State of Georgia to be employed beyond the limits of the state, and it was contended that these contracts and the making of same constituted an occupation connected with and relating to interstate commerce and that therefore the tax was unconstitutional.

However, the court in considering this argument used this language:

> "These agents were engaged in hiring laborers in Georgia to be employed beyond the limits of the state. Of course, transportation must eventually take place as the result of such contracts, but it does not follow that the immigrant agent was engaged in transportation, or that the tax on his occupation was levied on transportation."

In *Hooper v. California*, 155 U. S. 648, 15 S. Ct. 207, 39 L. Ed. 297, Mr. Justice White adverted to the distinction and difference between interstate commerce, or an instru-

mentality thereof, on the one side, and the mere incidents which may attend the carrying on of such commerce on the other side, and in said opinion he further states:

> "'If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise, and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states and would exclude state control over many contracts purely domestic in their nature.'"

In the *Williams v. Fears* case, supra, the Court held that the imposition of the tax upon the agent fell within the distinction which we have just stated and it was further held, specifically and definitely, that the labor contracts were not in themselves subjects of traffic between the states and that the business of hiring laborers was not so immediately connected with interstate transportation so that it could be correctly said that those who followed it were engaged in interstate commerce, or that the tax imposed was a burden upon interstate commerce.

The case of *Ware & Leland v. Mobile County*, 209 U. S. 405, 28 S. Ct. 526, 52 Law Ed. 855, was a case in connection with state taxation of buying and selling futures, the business being one of taking orders on commission for the purchase and sale of grain and cotton for future delivery and transmitting such orders to other states. The Court held that such transactions would not constitute interstate commerce. After reviewing a number of cases, Mr. Justice Day, who wrote the opinion, said (Page 858):

> "There is a class of cases which hold that contracts between citizens of different states are not the subjects of interstate commerce simply because they are negotiated between citizens of different states, or by the agent of a company in another state where the contract itself is to be completed and carried out wholly

within the borders of such state, although such contracts incidentally affect interstate trade."

The Court further said:

> "These contracts are not the subject of interstate commerce any more than in the insurance cases.... The delivery, when one was made, was not because of any contract obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject-matter of the purchase by means of interstate carriage would not make the contracts as made and executed the subjects of interstate commerce."

In *Anderson v. U. S.*, 171 U. S. 604, 19 S. Ct. 50, 43 Law Ed. 300, the Supreme Court said:

> "Where the subject- matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transactions of the business in which the parties to the agreement were engaged, such agreement will be withheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to obtain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental and not its purpose or object."

The Court, in the same case in a different part of the opinion used this language:

> "The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and bona fide purpose of properly and reasonably regulating the conduct of their busi-

> ness among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly though only indirectly and unintentionally affect interstate commerce, in that event we think the agreement would be good."

The Anderson case was considered in the case of *United States v. Fur Dressers' & Fur Buyers' Association,* 5 Fed (2nd) 869, which case is not necessarily in point as to the matter under consideration, but we merely desire to show that we have taken the foregoing quotations from said latter case.

We are familiar with the holdings in *Little v. Smith,* 124 Kan. 237, 257 P. 959, 57 A. L. R. 100; a Kansas case, and *State of Utah v. Salt Lake Tribune Publishing Company,* 68 Utah 187, 249 Pac. 474, 48 A. L. R. 553 a Utah case, which involved statutes of the states of Kansas and Utah, respectively, prohibiting the publishing of advertisements within said states of cigarettes, but we do not believe that same are controlling in the case at hand and we prefer to rely upon the holding of the Supreme Court of the United States in *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.,* 64 Law Ed. 649, 252 U. S. 436, 40 S. Ct. 385.

In the Kansas case, supra, the plaintiffs, partners publishing a newspaper in the State of Kansas, brought an action on behalf of themselves and also in behalf of the Kansas Press Association engaged in publishing approximately 175 newspapers in Kansas. The action was brought under a declaratory judgment statute for the interpretation of an Act, which prohibited the advertising of cigarettes in any newspaper or periodical published in Kansas. The plaintiffs alleged that they had a large interstate circulation of their newspapers, that they had received offers to publish in their papers advertisements of cigarettes made by manufacturers outside of Kansas, engaged in shipping their products into Kansas in the original package, but they had been

prevented from accepting such offers by reason of the statute. It was the plaintiff's contention that the statute transcended constitutional limitations by placing an unreasonable burden upon interstate commerce. The Court said at pages 961-2:

"It is insisted first by plaintiffs that under the statute, the sale of cigarettes is authorized and lawful with the exception as to minors, and must be treated as an article of commerce, and that, being manufactured in other states and transported and sold in this state, it is protected by the interstate commerce clause of the Federal Constitution. Advertisements of goods in interstate commerce is an aid to the sale and must be regarded as an essential part of the business. It has been held that 'newspapers are subjects of commerce, within the meaning of * * * the Constitution of the United States, relating to commerce between the states'. Preston v. Finley (C.C.) 72 Fed. 850.

In another case the court declared that 'every negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce.' Butler Bros. Shoe Co. vs. United States Rubber Co., 84 C. C. A. 167, 156 Fed. 1.

See also Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. Ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; International Textbook Co. v. Pigg, 217 U. S. 91; 54 L. Ed. 678; 27 L. R. A. (N. S.) 493; 30 Sup. Ct. Rep. 481; 18 Ann. Cas. 1103, Newspapers and other media of conveying information regarding proper subject of interstate commerce must be deemed to be engaged in such commerce. *Cigarettes transported from other states, sold in original packages, is commerce, and contracts for advertising and the newspapers themselves carrying such information and advertisements in order to promote sales are with-*

in the protection of the commerce clause of the Constitution." (Italics ours.)

A judgment in favor of the defendants was therefore reversed, the Court finding that the Act prohibiting the advertisement of cigarettes was unconstitutional.

Here was an interpretation of a Kansas statute, which prohibited newspapers and periodicals from carrying these advertisements of a product the sale and transportation of which was not prohibited. To prohibit these advertisements entirely, possibly was contrary to the commerce clause of the Federal Constitution as constituting an unreasonable burden upon interstate commerce, and the Court merely held that the advertising contracts were *within the protection of the commerce clause.* (Italics ours.)

It is readily apparent that this is entirely different and distinguishable from an attempt to levy a tax which is not directly burdensome upon an instrumentality of interstate commerce, assuming for the purpose of argument that these contracts are such instrumentalities but which we do not admit.

In the Utah case, supra, the defendant publishing company appealed from its conviction under a Utah statute making it a misdemeanor for any newspaper or periodical, printed or published in Utah, to display any advertisements of cigarettes or other forms of tobacco. The defendant published an advertisement of Lucky Strike cigarettes, pursuant to a contract for such advertising with a non-resident tobacco company. Its conviction for violation of the statute followed.

In reversing and annulling the judgment of the lower court and discharging the defendant, the Supreme Court of Utah said at page 477:

"It is expressly stipulated that the American Tobacco Company is a corporation of the state of New Jersey and that the advertisement in question was pub-

lished pursuant to a contract entered into between that company and the defendant. Under the ruling of the United States Supreme Court all sales by that company which were made in original packages are protected by the Interstate Commerce Act (U. S. Comp. Stat. Sec. 8563 et seq. 4 Fed. Stat. Anno. 2d ed. 537. *Moreover, as we have seen, the publication of the advertisement itself constitutes interstate commerce and hence is also protected by that act.*" (Italics ours.)

This statute likewise absolutely prohibited these advertisements. The sales themselves constituted interstate commerce. Without the advertisements, conceivably there may have been no sales and to prohibit the advertisements no doubt interfered with the sales.

Therefore, such prohibitions constituted direct and substantial burdens upon interstate commerce and for this reason the advertisements were within the protection of the commerce clause. In the case at Bar, the tax is merely upon the *revenue* derived from the completed act of advertising.

Suit was brought by Blumenstock Bros., supra, who conducted an advertising agency, against the Curtis Publishing Company in the Federal District Court to recover treble damages under Section 7 of the Sherman Anti-Trust Act, 26 Stat. At. L. 209, and the procedure in regard to advertising contracts was similar to the procedure under discussion here.

In the course of such business, the defendant dealt with plaintiff and also with other advertising agencies and it was contended that such dealings were transactions in interstate commerce and that the business of editing, publishing and distributing throughout the United States the advertising matter contained in the publications, pursuant to contracts made for such advertising, was interstate commerce.

The Court quoted from the opinion of Mr. Chief Justice Marshall in the celebrated case of *Gibbons v. Ogden*, 9

Wheat, 187, 6 Law Ed. 23, wherein it is said that commerce is not traffic alone, it is intercourse,—"it describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." The Court then continued and said:

> "The subject matter dealt with was the making of contracts for the insertion of advertising matter in certain periodicals belonging to the defendant. It may be conceded that the circulation and distribution of such publications throughout the country would amount to interstate commerce, but the circulation of these periodicals did not depend upon, or have any direct relation to the advertising contracts which the plaintiff offered and the defendant refused to receive, except upon the terms stated in the declaration. The advertising contracts did not involve any movement of goods or merchandise in interstate commerce, or any transmission of intelligence in such commerce."

In the present case we find a contract for advertising to be inserted in a New Mexico newspaper, which, in part is engaged in interstate commerce, insofar as circulation and distribution of the paper is concerned.

We are not concerned with the circulation and distribution of the paper, however. We are only concerned with the proceeds accruing to the paper by virtue of the contract for the insertion of such advertising.

In line with the foregoing and following the Blumenstock Case, we desire to call attention to the case of Howard W. Berry, trading as the Howard W. Berry Advertising Agency vs. Melvin C. Hazen, et al., which was decided in the United States District Court for the District of Columbia on November 22nd, 1937, and which has not yet been reported. The Court there held that the advertising contracts were not Interstate Commerce.

B.

TAXATION OF REVENUE RECEIVED UNDER THE CONTRACTS IMPOSES NO DIRECT OR SUBSTANTIAL BURDEN UPON INTERSTATE COMMERCE AND IS NOT PROHIBITED BY THE FEDERAL CONSTITUTION.

By referring to Section 202 of said Chapter 7 of the Special Session Laws of 1934, (App. A) we find that the taxes shall not apply to *"transactions in interstate commerce, which, under the constitution of the United States, the State of New Mexico is prohibited from taxing."* (Italics ours.)

There have been literally hundreds of cases involving the power of the states to levy taxes of one form or another upon transactions in interstate commerce or upon an instrumentality thereof, and the general test seems to be whether or not the imposition of the tax, compliance with certain conditions, requirements of licenses and so on, impose direct or substantial burdens upon interstate commerce.

An illustration of this statement may be found in *International Textbook Co. vs. Pigg,* 217 U. S. 91, 30 S. Ct. 481, 54 L. Ed. 678.

In that case a contract was involved which contemplated transactions between citizens of different states, bona fide transactions in interstate commerce. Without the contract in the first instance there could, of course, be no shipment of goods, no transaction in interstate commerce.

To directly burden the contract would of course constitute an undue interference with interstate commerce and would impose a direct and substantial burden thereon.

We would not for a moment contend that the state of New Mexico could impose a tax upon the cuts and mats mentioned in the Complaint as a privilege for them to enter the state. This certainly would be an undue interference with interstate commerce.

But assuming that these cuts and mats have an intrinsic value it will not on the other hand be argued by counsel that once they have come to rest in this state and acquired a situs, that a property tax could not be imposed upon them.

To show the power of the state to tax in matters affecting interstate commerce and the limitations upon such power, and as illustrative of direct and substantial burdens, we desire to refer to the following cases.

In the case of *Alpha Portland Cement Company vs. Massachusetts,* 268 U. S. 203, 45 S. Ct. 477, 69 L. Ed. 916, it was held that the state could not impose an excise tax measured in part upon the net income of a foreign corporation engaged in interstate commerce. In this connection, the Court said:

> "It must now be regarded as settled that a state may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the commerce clause; and the 14th Amendment does not permit taxation of property beyond the states' jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 87; 58 L. Ed. 127, 134; 34 Sup. Ct. Rep. 15, tends to support a different view, it conflicts with conclusions reached in later opinions, and is now definitely disapproved."

> "The local business of a foreign corporation may support an excise measure in any reasonable way, if neither interstate commerce nor property beyond the state is taxed. Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113; 65 L. Ed. 165; 41 Su. Ct. Rep. 45, approved such an excise measure by income reasonably attributed to intrastate business; but nothing there said was intended to modify well-established principles. It must be read with the essential facts in mind.

Local business was a sufficient basis for the excise, and there was no taxation of interstate commerce, or property beyond the state . . . ''

''The excise challenged by plaintiff in error is not materially different from the one declared unconstitutional in Cheney Bros. Co. v. Massachusetts, and cannot be enforced against a foreign corporation which does nothing but interstate business within the state . . . '' 69 L. Ed. 924.

It is also held in *Ozark Pipe Line Company vs. Monier,* 266 U. S. 555, 45 S. Ct. 184, 69 L. Ed. 439; and *Anglo Chilean Nitrate Sales Corporation vs. Alabama,* 288 U. S. 18, 53 S. Ct. 373, 77 L. Ed. 70, that certain statutes imposing franchise taxes were invalid when applied to foreign corporations engaged exclusively in interstate commerce.

''No State can compel a party, individual or corporation to pay for the privilege of engaging in interstate commerce.'' Atlantic and Pacific Telegraph Co. vs. Philadelphia, 190 U. S. 160, 47 L. Ed. 995.

In discussing a license tax, the Court, in *Postal Telegraph Co. vs. Richmond,* 249 U. S. 252, 39 S. Ct. 265, 63 L. Ed. 590, said:

''The principle of these cases, and of many others cited in the opinions, is that, as against Federal constitutional limitations of power, a state may lawfully impose a license tax, restricted, as it is in this case, to the right to do local business within its borders, where such tax does not burden, or discriminate against interstate business, and where the local business purporting to be taxed, again as in this case, is so substantial in amount that it does not clearly appear that the tax is a disguised attempt to tax interstate commerce . . . '' 63 L. Ed. 594.''

In other words, the state is not possessed of power to impose a tax upon interstate business, though it may tax

the local business of a corporation engaged in interstate commerce.

In *Postal Telegraph Co. vs. Adams,* 155 U. S. 688, at page 695, 15 S. Ct. 268, 39 L. Ed. 311 at 315, the Court pointed out that property of a foreign corporation engaged in interstate commerce could be taxed in the state where located, but that duties laid on the subjects of interstate commerce or on the receipts derived therefrom amounted to a regulation of such commerce and therefore was repugnant to the commerce clause of the Constitution.

A tax upon gross receipts of a telegraph company engaged in interstate commerce will be enjoined as to that portion of the receipts derived from interstate commerce. *Ratterman vs. Western Union,* 127 U. S. 411, 8 S. Ct. 1127, 32 L. Ed. 229.

In other cases cited in the Ratterman case it is held that a state tax on interstate telegraph messages is not enforceable. To the same effect is the holding in *Western Union Telegraph Co. vs. Seay,* 132 U. S. 472, 10 S. Ct. 161, 33 L. Ed. 409.

It is said in a very recent case in our own Supreme Court, *Transcontinental and Western Air, Inc., vs. Lujan,* 36 N. M. 64, 8 Pac. (2nd) 103, "Interstate commerce is sacred only because of the exclusive power of the Congress to regulate it. Many forms of state taxation are permitted, even though a burden may fall upon those engaged in commerce among the states. 'Even interstate commerce must pay its way'."

Also directly in point with the above is the case of *Matson Navigation Co. v. State Board of Equalization,* 297 U. S. 441, 56 S. Ct. 553, 80 L. Ed. 791, rehearing denied 297 U. S. 728, 56 S. Ct. 666, 80 L. Ed. 1011.

All of these cases are authority for the proposition that a tax on gross receipts of companies engaged in interstate commerce amounts to a tax upon the business itself and therefore constitutes a direct and substantial burden upon

such interstate commerce. But a tax imposed upon net income of a company engaged in interstate business is entirely different, and the imposition of such tax does not contravene the commerce clause of the Constitution.

As was said in *United States Glue Co. vs. Town of Oak Creek*, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135.

> "A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce."

In speaking of the tax upon net profits the Court further said:

> "A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the states are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States."

Other cases supporting this view are *Virginia vs. Imperial Coal Sales Co., 293 U. S. 15, 79 L. E. 171, 55 S. Ct. 12. Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550, 55 S. Ct. 525, 79 L. Ed. 1054; *Fox Film Corp. vs. Doyal*, 286 U. S. 123, 52 S. Ct. 546, 76 L. Ed. 1010; *Educational Film Corp.*

vs. Ward, 282 U. S. 379, 51 S. Ct. 170, 75 L. Ed. 400; and *Anglo Chilean Nitrate Sales Corp. v. Alabama,* 288 U. S. 218, 53 S. Ct. 343, 77 L. Ed. 710.

In *Commonwealth of Virginia vs. Imperial Coal Sales Company,* 293 U. S. 15, 55 S. Ct. 12, 79 L. Ed. 171, the court held that interstate commerce is not unconstitutionally burdened by a state's imposition on a domestic corporation, having its principal place of business in the state, whose sole business is that of selling in interstate commerce coal for foreign coal mining companies, collecting the proceeds of sale and paying them, less commissions, to the mining companies of a so-called "capital tax", which is in fact an ad valorem tax on the excess of the corporation's bills and accounts receivable over its bills and accounts payable, and on money on hand and on deposit.

The Court stated:

> "The effect upon interstate commerce as in other instances of non-discriminatory property taxation is at most indirect and incidental."

Congress has the power, under the commerce clause, to regulate commerce with foreign nations and among the several states and with the Indian tribes. This power was surrendered to Congress by the states and therefore no state can enact or enforce any measure, the effect of which is to constitute or impose a direct burden upon interstate commerce.

But this does not mean, as heretofore pointed out, that the state has no power to levy taxes at all affecting interstate commerce. In the case at Bar the tax under consideration is an excise tax, a privilege tax, and is a valid exercise of the state's taxing power. *Postal Telegraph Cable Co. v. Adams,* 71 Miss. 555, 14 So. 36, 42 A.S.R. 476.

To escape the force of this doctrine appellant argues that the tax in question is not in reality upon the privilege of engaging in business, but one upon the sale or transaction

itself. To sustain this argument it cites Sec. 204 of the Act relating to the absorption of the tax. Without conceding the materiality of such argument, we submit that a mere cursory examination of the Act demonstrates the inherent fallacy of such a contention. The title of the act states distinctly and unequivocally that it is levied for the privilege of engaging in business or following a profession. By Section 3 (g), casual or isolated sales and transactions by persons in holding themselves out as engaged in business are exempt. Section 310 requires the payment of a license fee of $1.00 as a prerequisite to engaging in business. (Appendix A). These two sections alone are enough to illustrate that Chapter 7, Special Sessions Laws of 1934, is in reality an excise for the privilege of engaging in business, and not a tax levy upon the sale or transaction. In typical sale or use tax acts casual or isolated sales are not exempt such as in the case at bar, but the tax is actually levied upon the transaction. That a tax similar to the one under consideration is an excise for the privilege of engaging in business, and not a tax upon the sale or transaction, is no longer subject to doubt. See *In Re Messenger's Merchants Lunch Room* (C. C. A. 7), 85 Fed. (2d) 1002.

For the information of the Court we desire to point out in addition to what has already been said, that most of the general rules concerning this matter are fully set forth in 5 R.C.L. pages 784 to 801, and in notes in 6 L.R.A. 579; 11 L.R.A. 246-179; 12 L.R.A. 624; 29 Law Ed. 158; 9 L.R.A. 366; 6 Law Ed. 23-678; 32 Law Ed. 229; 37 Law Ed. 217; 38 Law Ed. 1041; 39 Law Ed. 311-538.

C.

APPELLANTS' CASES DISTINGUISHED

Appellant relies chiefly upon *Indiana Farmers' Guide Publishing Company vs. Prairie Farmers Publishing Company*, 293 U. S. 268, 55 Sup. Ct. Rep. 182; 79 L. Ed. 356; *Fishers Blend Station, Inc. vs. Tax Commission of the State of Washington*, 297 U. S. 650, 56 Sup. Ct. Rep. 608, 80 L. Ed. 956; *International Textbook Company vs. Pigg*, 217

U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678; *Post Printing and Publishing Company vs. Brewster,* 246 Fed. 321; *State vs. Salt Lake Tribune Publishing Company,* 68 Utah 187, 249 P. 474, 48 A.L.R. 553; *Little vs. Smith,* 124 Kans. 237, 257 P. 959, 57 A.L.R. 100.

As was said by the Supreme Court of New Mexico, (R. 10-19) in the opinion rendered in this case, a careful analysis of these cases in the light of what is said in the *Blumenstock* case, supra, and in *Paul vs. Virginia*, supra, fails to persuade us that the advertising contracts themselves although made between citizens of different states are transactions in interstate commerce.

Our Supreme Court, (R. 10-19) also pointed out, that the *Blumenstock* case had not been decided when the opinion in the *Brewster* case, supra, was written.

However, the *Blumenstock* case was decided several years before the *Salt Lake Tribune* case and the *Little vs. Smith* case, supra, but in neither of these cases was the *Blumenstock* case mentioned and in neither case did the court have the benefit of the *Blumenstock* opinion when they indicated that the advertising contracts were to be deemed as transactions in interstate commerce.

In *Indiana Farmers' Guide Publishing Company vs. Prairie Farmers Publishing Company,* 293 U. S. 268, 55 Sup. Ct. Rep. 182, 79 L. Ed. 356, we find another case to collect treble damages under the Sherman Anti-Trust Act. The plaintiff in that case was the publisher of the Indiana Farmers' Guide at Huntington, Indiana, which had a circulation of one hundred sixty thousand, of which over two-thirds were in Indiana and approximately fifty thousand in other states. The defendants were publishers of newspapers which were general and not vocational in character.

However, the names of the papers were calculated to develop a circulation among farmers in the six mid-western states where published. The larger part of the circulation of each newspaper was in the state where published. Most of the advertisers in the papers were located in states other

than the state of publication and about ninety per cent of the advertising came from points outside of the State of Indiana.

It was claimed that there was a combination in restraint of trade by virtue of an arrangement through the mid-west unit whose officers and agents were representatives of the other defendants. By virtue of this arrangement a combination rate of advertising in all seven of the papers was much less than the total of separate charges for the same advertisement in any six.

In the opinion the court cited and discussed the *Blumenstock* case and distinguished it upon the ground that the subject-matter dealt with in the *Blumenstock* case was the making of contracts for the insertion of advertising matter in certain periodicals belonging to the defendant. The court then said:

> "The business that is here alleged to have been damaged is the publication and circulation of these farm papers. That business includes the obtaining of advertising, the transportation between the states of electrotypes sent respectively to petitioners and respondents by their customers to be used in setting of advertisements and the transportation of substantial quantities of the papers in interstate commerce advertising at compensatory rates for an essential element. The opinion in Blumenstock Brothers Advertising Agency vs. Curtis Publishing Company (citation) assumed that a publishing business such as that now under consideration would amount to interstate commerce. There is no ground for the contention that the evidence in this case is not sufficient to go to the jury on the question of interstate commerce.

In the case now before this court the subject-matter with which we are dealing is the validity of the act imposing a tax measured by receipts arising from contracts by citizens of other states with plaintiff, appellant here, for the

insertion of advertisements in their magazine which is published in the State of New Mexico.

The mere fact that the magazine itself has an interstate circulation does not thereby give an interstate character to the contracts themselves. The same situation prevails in the Blumenstock case.

Fisher's Blend Station, Incorporated vs. Tax Commission of the State of Washington, 297 U. S. 650, 56 Sup. Ct. Rep. 608, 80 L. Ed 956.

In that case, a Statute of the State of Washington levied a state occupation tax measured by gross receipts from radio broadcasting stations, within the State, and the Radio Station filed suit to enjoin collection of the tax, maintaining that same was enfringement upon the Commerce Clause of the Federal Constitution.

The Court discused the technique of broadcasting and the transmission of intelligence by means of sound waves, through the air and held that it constituted interstate commerce, and the Court further held that as the income of the Radio Company was derived from interstate commerce, the tax measured by its gross income was of a type, which was unconstitutional as being a burden upon interstate commerce.

In the case at Bar, we are not dealing with any imposition of tax upon receipts derived from interstate commerce or any instrumentality thereof.

In the *Fisher's Blend Case,* supra, the taxpayer, for a consideration, transmitted information from its stations in Washington to others who listened in through receiving sets in other states. The very essence of the radio business is direct transmission of intelligence in interstate commerce through the air. As stated by this court in the *Fisher's Blend Case,* it is a transaction similar in nature to the sending of messages across state lines by telephone or telegraph. A radio broadcast is, therefore, essentially an interstate transaction from its inception as it is impossible to confine

its scope within state lines. See *KVL v. Tax Commission*, 12 F. Supp. 497.

In the case at bar the situation is not parallel. Virtually the only element giving any interstate color to the transaction is the distribution of the newspaper or magazine across state lines. The tax under consideration is not one which is directed at the interstate distribution or circulation of periodicals. To the contrary, it is merely a privilege tax measured by the gross amount received in the conduct of a given business. The taxable revenue is derived from the proceeds of advertising contracts which in no way involve direct and uncontrolled dissemination of information in interstate commerce as in the case of radio broadcasts and telephone and telegraph service. Here the essential element bargained for is the furnishing of advertising space in periodicals for a given consideration. Every radio broadcast always and inescapably involves interstate communication, while on the other hand interstate circulation of a newspaper is merely one of the many incidents of its publication. It may or may not have interstate circulation, and the particular advertisement may be inserted with no other purpose than to attract local customers. A newspaper or magazine is not an instrumentality primarily designed for direct dissemination, communication or exchange of information in interstate commerce as are the radio, telephone and telegraph.

In the *Fisher's Blend Case*, the broadcast of the program or advertisement was of itself interstate commerce and could be nothing else. In the case at bar interstate character depends upon interstate circulation of which the advertisement is but an incident. The *Fisher's Blend Case* exemplifies interstate communication of intelligence as giving interstate color to the transaction involved. Here interstate transportation of the periodicals is the only element which may conceivably afford characterization as interstate commerce, with interstate communication of intelligence as a mere incident and not controlling.

The weakness of appellant's analogy is apparent when

we consider the practical effect of the doctrine announced in the *Fisher's Blend case* if applicable to the case at bar. If that doctrine is applicable and is carried to its logical conclusion, not only is foreign advertising exempt, but likewise local advertising. It would fall within the same strictures announced therein, as it involves the same interstate transportation and communication as foreign advertising. This would be so even though a grocer in Santa Fe or Albuquerque, New Mexico, advertised a special one-day sale of staples with no idea at all of attracting customers outside the city. In final analysis, it would mean that the income of newspapers or magazines with interstate circulation, however small, would be exempt, notwithstanding they are not subject to rigid Federal surveillance and license as is the radio. It would mean that one of the most profitable industries in this state would entirely escape sharing its just share of the tax burden. We submit that this court undoubtedly meant to confine the doctrine announced in the *Fisher's Blend* case to radio, telephone, telegraph, or other like instrumentalities which are primarily designed for direct communication of intelligence and information in interstate commerce.

In the case of *International Textbook Company vs. Pigg*, 217 U. S. 91, 30 S. Ct. 481, 54 L. Ed. 678, there was a continuous movement of textbooks, apparatus, letters of instruction, and the like, and these entered into the very essence of the contract. The movement itself was in constant execution and fulfillment of the contract and did not constitute merely a preliminary step incident to preparing one of the parties for performance as in the case at Bar.

As shown in the Court's opinion in this case, it is argued by counsel for appellant that even if such a contract as the one at hand in the instant case and the one in the Blumenstock case are not deemed as interstate transactions, nevertheless the interstate movement of advertising cuts, mats and copy contemplated by the contracts with advertisers causes such contracts and the performance thereof to constitute transactions in interstate commerce within the doc-

trine of the Pigg case, but as shown in the above discussion of the Pigg case, such premise cannot be correct. No more than could a contract between two residents of the State of New Mexico for the construction of a building in New Mexico constitute a transaction in interstate commerce merely by reason of the fact that the contract conceivably might call for materials and supplies the purchase of which and the delivery of same might involve a movement in interstate commerce.

To repeat our former statement contained in our summary, the revenues derived from these contracts may be taxed by the state and this would be true even though such contracts were deemed to be instrumentalities of interstate commerce inasmuch as the imposition of this tax does not impose a direct or substantial burden upon interstate commerce and it does not unduly interfere with it, but such taxation would only incidentally and remotely affect such interstate commerce.

CONCLUSION

We submit that in view of all the foregoing, that this case falls within the principle enunciated in *Hump Hairpin Manufacturing Co. vs. Emerson,* 258 U. S. 290, 42 S. Ct. 305, 66 L. Ed. 622, and in closing we quote from the opinion therein, page 294:

> "While a state may not use its taxing power to regulate or burden interstate commerce (United States Exp. Co. v. Minnesota, 223 U. S. 335, 56 L. ed. 459, 32 Sup. Ct. Rep. 211; International Paper Co. v. Massachusetts, 246 U. S. 135, 62 L. ed. 624, 38 Sup. Ct. Rep. 292, Ann. Cas. 1918C 617), on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating Federal constitutional rights. As coming within this latter description, taxes have been so re-

peatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce) to be assessed, that the principle of the cases so holding must be regarded as a settled exception to the general rule. Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Comm. Rep. 807, 12 Sup. Ct. Rep. 121, 163; Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. Rep. 107; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; United States Exp. Co. v. Minnesota, 223 U. S. 335, 343, 56 L. ed. 459, 464, 32 Sup. Ct. Rep. 211; Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 58 L. ed. 127, 34 Sup. Ct. Rep. 15; Kansas City, M. & B. R. Co. v. Stiles, 242 U. S. 111, 61 L. ed. 176, 37 Sup. Ct. Rep. 58; United States Glue Co. v. Oak Creek, 247 U. S. 321, 326, 327, 62 L. ed. 1135, 1140, 1141, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748. The turning point of these decisions is whether, in its incidence, the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon, it, or whether it affects it only incidentally or remotely, so that the tax is not in reality a burden, although in form it may touch, and, in fact, distantly affect, it."

WHEREFORE, appellee submits that there is no error shown in the record and that the judgment and decision of the Supreme Court of the State of New Mexico reversing the decision of the lower court in overruling the demurrer of defendants, appellees here, and with directions to sustain the demurrer should be affirmed.

Respectfully submitted,

FRANK H. PATTON,
Attorney General of the State of N. M.
Attorney for Appellee.

APPENDIX A.

Chapter 7, Special Session Laws of 1934 of New Mexico.

An Act To Provide For the Raising of Revenue for Emergency School Purposes by Imposing an Excise Tax Upon The Engaging Or Continuing In Business, Professions, Trades and Callings For Profit In This State; Providing For The Levy, Assessment, And Collection of Said Tax; Providing For the Distribution of the Taxes so Collected And Making An Appropriation Of The Same; Making Appropriations For The Administration of This Act, And For Refunds of Taxes Unlawfully Collected; Providing Penalties For The Violation of the Provisions of This Act; Repealing Chapter 72, and 115 of the New Mexico Session Laws of 1933, and Declaring an Emergency.

S. B. No. 15; Approved April 25, 1934.

Be It Enacted by the Legislature of the State of New Mexico:

* * * * * * * * * * * * *

"Sec. 3. When used in this act: * * * * *

(g) The term 'engaging' as used in this Act with reference to engaging or continuing in a business or a profession shall also include the exercise of corporate or franchise power, *but the term 'engaging' shall not be construed in this Act to include occasional and isolated sales, or transactions by a person who does not hold himself out as engaged in business.*" (emphasis ours).

Sec. 201. There is hereby levied, and shall be collected by the Tax Commission, privilege taxes, measured by the amount or volume of business done, against the persons, on account of their business activities, engaging, or continuing, within the State of New Mexico, in any business as herein defined, and in the amounts determined by the application of rates against gross receipts, as follows: * * *

I. At an amount equal to two per cent of the gross receipts of any person engaging or continuing in any of the following businesses: * * * * * * publication of newspapers and magazines (but the gross receipts of the business of publishing newspapers or magazines shall include only the amounts received for the sale of advertising space);

* * * * * * * * * * * * *

Sec. 202. None of the taxes levied by this Act shall be construed to apply to transaction in interstate or foreign commerce, or commerce with the Indian tribes, which, under the constitution of the United States, the State of New Mexico is prohibited from taxing; nor shall such taxes apply to sales made to the Government of the United States or any of its departments or agencies, nor to sales to the State of New Mexico or any of its departments or agencies; nor to any business or transactions exempted from taxation under the constitution of the United States or the constitution of the State of New Mexico; provided that if the Congress of the United States shall hereafter permit the taxation of transactions in interstate commerce, the taxes levied by this act shall apply to such transactions to the extent permitted by any act of Congress.

Sec. 206. If any person engaged in any business subject to tax under this Act shall ship or transport his products, or any part thereof, out of the state without making sale of such products, or shall ship his products outside of the state in an unfinished condition, the value of the products or articles in the condition or form in which they existed when transported out of the state and before they enter interstate commerce, shall be the basis for the assessment of the tax on such business, and the Tax Commission shall prescribe equitable and uniform rules for ascertaining such value.

Sec. 301. After thirty days from the effective date of this act no person shall engage or continue in any business within this state, subject to taxation under this act, unless he shall file with the Tax Commission an application for a

license. Every such application shall be made upon a form prescribed by the Tax Commission, shall set forth the name in which applicant transacts or intends to transact business, the location of his place or places of business, the character of the business to be transacted, and such other information as the Tax Commission may require. The application shall be signed by the owner of the business, if a natural person, and in the case of an association or partnership, by a member or partner thereof; in the case of a corporation, by an executive officer thereof or some person specifically authorized by the corporation to sign the application. Such application shall be accompanied by a license fee of $1.00 for each place of business of the applicant, in charge of the owner, any agent or employee, excluding telephone toll and pay station.

APPENDIX B.

Chapter 9, Session Laws of 1935 of New Mexico.

An Act Creating a Bureau of Revenue, Defining Its Powers and Duties, Providing For a Commissioner of Revenue, Agents, Auditors and Employees; Transferring to Said Bureau the Power and Duty to Administer the Laws With Respect to Automobiles and the Licensing Thereof; the Collection, Disposition and Refunding of Taxes Upon Gasoline and Other Motor Vehicle Fuels; the Taxation of Incomes; the Collection of the School Emergency Tax of 1934; the Collection of Licenses and Taxes on Retail Dealers in Merchandise; and the Collection of Taxes on Alcoholic Liquors; and Other Duties; Transferring to Said Bureau Unexpended Balances and Percentages of Collections Authorized to be Expended for the Enforcement of All the Foregoing Laws, and For a Transfer of Furniture, Equipment and Supplies Used in the Enforcement Thereof; Provided For the Payment of Salaries and Expenses of the Commissioner of Revenue, His Agents, Auditors and Other Employees, and for the Maintenance and Operation of His Department; Locating the Office of Said Bureau and Requiring the Commissioner of Revenue to Give Bond.

Senate Bill No. 5; Approved February 5, 1935.

Be It Enacted By the Legislature of the State of New Mexico:

Section 1. There is hereby established a Bureau of Revenue. The said bureau shall be vested and charged with the following powers and duties, which powers and duties are hereby transferred to it from the commissions, departments and offices now exercising the same as hereinafter set out, to-wit: the powers and duties now conferred and imposed upon the State Comptroller with respect to automobiles and motor vehicles and the licensing thereof; the powers and duties now conferred and imposed upon the State Comptroller with respect to the collection, disposition

and refunding of taxes upon gasoline and other motor fuels; the powers and duties now conferred and imposed upon the State Tax Commission and the State Treasurer by Chapter 85 of the Laws of 1933 as amended by Chapter 29 of the Laws of 1934, Special Session, with respect to the taxation of incomes; the powers and duties now conferred and imposed upon the State Tax Commission by the Emergency School Tax Act of 1934, being Chapter 7 of the Laws of 1934, Special Session; the powers and duties now conferred and imposed upon the State Comptroller by Chapter 73 of the Laws of 1933, and Chapter 33 of the Laws of 1934, Special Session, relating to License and Occupation Taxes on retail dealers in merchandise; the powers and duties now conferred and imposed upon the State Treasurer by Chap. 30 of the Laws of 1934, Special Session, with respect to the levy and collection of taxes on alcoholic liquors; the powers and duties imposed on said Bureau of Revenue shall include the enforcement of all laws relating to the foregoing subjects now existing or hereafter enacted.

APPENDIX C.

Article I, Section 8; United States Constitution.

Section 8. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; * * * * * * *

SUPREME COURT OF THE UNITED STATES.

No. 322.—October Term, 1937.

Western Live Stock, a Partnership Composed of Frazier Biggs and D. F. Biggs, Appellants,
vs.
Bureau of Revenue and John A. Bingaman, Commissioner of Revenue.

Appeal from the Supreme Court of the State of New Mexico.

[February 28, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

Section 201, c. 7, of the New Mexico Special Session Laws of 1934, levies a privilege tax upon the gross receipts of those engaged in certain specified businesses.[1] Subdivision I imposes a tax of 2% of amounts received from the sale of advertising space by one engaged in the business of publishing newspapers or magazines. The question for decision is whether the tax laid under this statute on appellants, who sell without the state, to advertisers there, space in a journal which they publish in New Mexico and circulate to subscribers within and without the state, imposes an unconstitutional burden on interstate commerce.

Appellants brought the present suit in the state district court to recover the tax, which they had paid under protest, as exacted in violation of the commerce clause of the Federal Constitution. The trial court overruled a demurrer to the complaint and gave judgment for appellants, which the Supreme Court reversed. 41 N. M. 141. Appellants refusing to plead further, the district court gave judgment for the appellees, which the Supreme

[1] "Sec. 201. There is hereby levied, and shall be collected by the Tax Commission, privilege taxes, measured by the amount or volume of business done, against the persons, on account of their business activities, engaging, or continuing, within the State of New Mexico, in any business as herein defined, and in the amounts determined by the application of rates against gross receipts, as follows:

. . . . . .

"I—At an amount equal to 2% of the gross receipts of any person engaging or continuing in any of the following businesses: . . . publication of newspapers and magazines (but the gross receipts of the business of publishing newspapers or magazines shall include only the amounts received for the sale of advertising space) . . ."

Court affirmed. — N. M. —. The case comes here on appeal from the second judgment under § 237 of the Judicial Code.

Appellants publish a monthly livestock trade journal which they wholly prepare, edit, and publish within the state of New Mexico, where their only office and place of business is located. The journal has a circulation in New Mexico and other states, being distributed to paid subscribers through the mails or by other means of transportation. It carries advertisements, some of which are obtained from advertisers in other states through appellants' solicitation there. Where such contracts are entered into, payment is made by remittances to appellants sent interstate; and the contracts contemplate and provide for the interstate shipment by the advertisers to appellants of advertising cuts, mats, information and copy. Payment is due after the printing of such advertisements in the journal and its ultimate circulation and distribution, which is alleged to be in New Mexico and other states.

Appellants insist here, as they did in the state courts, that the sums earned under the advertising contracts are immune from the tax because the contracts are entered into by transactions across state lines and result in the like transmission of advertising materials by advertisers to appellants, and also because performance involves the mailing or other distribution of appellants' magazines to points without the state.

That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of Congressional action, unless the performance is within its protection, is a proposition no longer open to question. *Paul* v. *Virginia*, 8 Wall. 168; *Hooper* v. *California*, 155 U. S. 648; *New York Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495; cf. *Ware & Leland* v. *Mobile County*, 209 U. S. 405; *Engel* v. *O'Malley*, 219 U. S. 128. Hence it is unnecessary to consider the impact of the tax upon the advertising contracts except as it affects their performance, presently to be discussed. Nor is taxation of a local business or occupation which is separate and distinct from the transportation and intercourse which is interstate commerce forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by the business. *Williams* v. *Fears*, 179 U. S. 270; *Ware & Leland* v. *Mobile County, supra; Browning v. Waycross*, 233 U. S. 16; *General Railway Signal Co.* v. *Virginia*, 246 U. S. 500, 510; *Utah Power & Light Co.* v. *Pfost*, 286

U. S. 165. Here the tax which is laid on the compensation received under the contract is not forbidden either because the contract, apart from its performance, is within the protection of the commerce clause, or because as an incident preliminary to printing and publishing the advertisements the advertisers send cuts, copy and the like to appellants.

We turn to the other and more vexed question, whether the tax is invalid because the performance of the contract, for which the compensation is paid, involves to some extent the distribution, interstate, of some copies of the magazine containing the advertisements. We lay to one side the fact that appellants do not allege specifically that the contract stipulates that the advertisements shall be sent to subscribers out of the state, or is so framed that the compensation would not be earned if subscribers outside the state should cancel their subscriptions. We assume the point in appellants' favor and address ourselves to their argument that the present tax infringes the commerce clause because it is measured by gross receipts which are to some extent augmented by appellants' maintenance of an interstate circulation of their magazine.

It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. "Even interstate business must pay its way", *Postal Telegraph Cable Co.* v. *Richmond*, 249 U. S. 252, 259; *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1, 24; *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 696; *Galveston, H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217, 225, 227, and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business. He is subject to a property tax on the instruments employed in the commerce. *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530; *Cleveland, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 439; *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194; *Adams Express Co.* v. *Kentucky*, 166 U. S. 171; *Western Union Tel. Co.* v. *Missouri ex rel. Gottlieb*, 190 U. S. 412; *Old Dominion S. S. Co.* v. *Virginia*, 198 U. S. 299, and if the property devoted to interstate transportation is used both within and without the state a tax fairly apportioned to its use within the state will be sustained. *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450. Net earnings from interstate commerce are subject to income

tax, *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321, and if the commerce is carried on by a corporation a franchise tax may be imposed, measured by the net income from business done within the state, including such portion of the income derived from interstate commerce as may be justly attributable to business done within the state by a fair method of apportionment. *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113; cf. *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission,* 266 U. S. 271.

All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that reason prohibited. On the other hand, local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed (*Fargo* v. *Michigan,* 121 U. S. 230; *Philadelphia & S. S.S. Co.* v. *Pennsylvania,* 122 U. S. 326; *Galveston, H. & S. A. R. Co.* v. *Texas, supra; Meyer* v. *Wells, Fargo & Co.,* 223 U. S. 298) or added to (*Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *Fisher's Blend Station, Inc.* v. *State Tax Commission,* 297 U. S. 650) with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. *See Philadelphia & S. S.S. Co.* v. *Pennsylvania, supra,* 346; *State Freight Tax,* 15 Wall. 232, 280; Bradley, J., dissenting in *Maine* v. *Grand Trunk Railway Co.,* 142 U. S. 217, 235; cf. *Pullman's Palace Car Co.* v. *Pennsylvania, supra,* 26. The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove. *Baldwin* v. *Seelig,* 294 U. S. 511, 523.

It is for these reasons that a state may not lay a tax measured by the amount of merchandise carried in interstate commerce, *State Freight Tax, supra,* or upon the freight earned by its carriage. *Fargo* v. *Michigan, supra; Philadelphia & S. S.S. Co.* v. *Pennsylvania, supra,* restricting the effect of *State Tax on Railway Gross Receipts,* 15 Wall. 284, with which compare Miller, J., dissenting in that case at p. 297. Taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing state, *Wis-*

consin & M. R. Co. v. *Powers,* 191 U. S. 379; *Maine* v. *Grand Trunk Railway, supra; Cudahy Packing Co.* v. *Minnesota, supra; United States Express Co.* v. *Minnesota,* 223 U. S. 335, and in other cases has been rejected only because the apportionment was found to be inadequate or unfair. *Fargo* v. *Michigan, supra; Galveston, H. & S. A. R. Co.* v. *Texas, supra; Meyer* v. *Wells, Fargo & Co., supra,* with which compare *Wisconsin & M. R. Co.* v. *Powers, supra.* Whether the tax was sustained as a fair means of measuring a local privilege or franchise, as in *Maine* v. *Grand Trunk Railway, supra; Ficklen* v. *Shelby County Taxing District, supra; American Manufacturing Company* v. *St. Louis,* 250 U. S. 459, or as a method of arriving at the fair measure of a tax substituted for local property taxes, *Cudahy Packing Co.* v. *Minnesota, supra; United States Express Company* v. *Minnesota, supra;* cf. *Postal Telegraph Cable Co.* v. *Adams, supra;* see *McHenry* v. *Alford,* 168 U. S. 651, 670-671, it is a practical way of laying upon the commerce its share of the local tax burden without subjecting it to multiple taxation not borne by local commerce and to which it would be subject if gross receipts, unapportioned, could be made the measure of a tax laid in every state where the commerce is carried on. A tax on gross receipts from tolls for the use by interstate trains of tracks lying wholly within the taxing state is valid, *New York, L. E. & W. R. Co.* v. *Pennsylvania,* 158 U. S. 431; cf. *Henderson Bridge Co* v. *Kentucky,* 166 U. S. 150, although a like tax on gross receipts from the rental of railroad cars used in interstate commerce both within and without the taxing state is invalid. *Fargo* v. *Michigan, supra.* In the one case the tax reaches only that part of the commerce carried on within the taxing state; in the other it extends to the commerce carried on without the state boundaries, and, if valid, could be similarly laid in every other state in which the business is conducted.

In the present case the tax is, in form and substance, an excise conditioned on the carrying on of a local business, that of providing and selling advertising space in a published journal, which is sold to and paid for by subscribers, some of whom receive it in interstate commerce. The price at which the advertising is sold is made the measure of the tax. This Court has sustained a similar tax said to be on the privilege of manufacturing, measured by the total gross receipts from sales of the manufactured goods both intrastate and interstate. *American Manufacturing Co.* v. *St. Louis,*

supra, 462. The actual sales prices which measured the tax were taken to be no more than the measure of the value of the goods manufactured, and so an appropriate measure of the value of the privilege, the taxation of which was deferred until the goods were sold. *Ficklen* v. *Shelby County Taxing District*, *supra*, sustained a license tax measured by a percentage of the gross annual commissions received by brokers engaged in negotiating sales within for sellers without the state.

Viewed only as authority, *American Manufacturing Co.* v. *St. Louis*, *supra*, would seem decisive of the present case. But we think the tax assailed here finds support in reason, and in the practical needs of a taxing system which, under constitutional limitations, must accommodate itself to the double demand that interstate business shall pay its way, and that at the same time it shall not be burdened with cumulative exactions which are not similarly laid on local business.

As we have said, the carrying on of a local business may be made the condition of state taxation, if it is distinct from interstate commerce, and the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce. Cf. *Puget Sound Stevedoring Co.* v. *Tax Comm'n*, 302 U. S. —, —. No one would doubt that the tax on the privilege would be valid if it were measured by the amount of advertising space sold. *Utah Power & Light Co.* v. *Pfost*, *supra*; *Federal Compress & W. Co.* v. *McLean*, 291 U. S. 17, or by its value. *Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172; *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284. Selling price, taken as a measure of value whose accuracy appellants do not challenge, is for all practical purposes a convenient means of arriving at an equitable measure of the burden which may be imposed on an admittedly taxable subject matter. Unlike the measure of the tax sustained in *American Manufacturing Co.* v. *St. Louis*, *supra*, it does not embrace the purchase price (here the magazine subscription price) of the articles shipped in interstate commerce. So far as the advertising rates reflect a value attributable to the maintenance of a circulation of the magazine interstate, we think the burden on the interstate business is too remote and too attenuated to call for a rigidly logical application of the doctrine that gross receipts from interstate commerce may not be made the measure of a tax. Experience has taught that the op-

posing demands that the commerce shall bear its share of local taxation, and that it shall not, on the other hand, be subjected to multiple tax burdens merely because it is interstate commerce, are not capable of reconciliation by resort to the syllogism. Practical rather than logical distinctions must be sought. See *Galveston, H. & S. A. R. Co.* v. *Texas, supra,* 227. Recognizing that not every local law that affects commerce is a regulation of it in a constitutional sense, this Court has held that local taxes may be laid on property used in the commerce; that its value for taxation may include the augmentation attributable to the commeree in which it is employed; and, finally, that the equivalent of that value may be computed by a measure related to gross receipts when a tax of the latter is substituted for a tax of the former. See *Galveston, H. & S. A. R. Co.* v. *Texas, supra,* 225.

Here it is perhaps enough that the privilege taxed is of a type which has been regarded as so separate and distinct from interstate transportation as to admit of different treatment for purposes of taxation, *Utah Light & Power Co.* v. *Pfost, supra; Federal Compress & Warehouse Co.* v. *McLean, supra; Chassaniol* v. *Greenwood,* 291 U. S. 584, and that the value of the privilege is fairly measured by the receipts. The tax is not invalid because the value is enhanced by appellants' circulation of their journal interstate any more than property taxes on railroads are invalid because property value is increased by the circumstance that the railroads do an interstate business.

But there is an added reason why we think the tax is not subject to the objection which has been leveled at taxes laid upon gross receipts derived from interstate communication or transportation of goods. So far as the value contributed to appellants' New Mexico business by circulation of the magazine interstate is taxed, it cannot again be taxed elsewhere any more than the value of railroad property taxed locally. The tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine. As already noted, receipts from subscriptions are not included in the measure of the tax. It is not measured by the extent of the circulation of the magazine interstate. All the events upon which the tax is conditioned—the preparation, printing and publication of the advertising matter, and the receipt of the sums paid for it—occur in New Mexico and not elsewhere. All are be-

yond any control and taxing power which, without the commerce clause, those states could exert through its dominion over the distribution of the magazine or its subscribers. The dangers which may ensue from the imposition of a tax measured by gross receipts derived directly from interstate commerce are absent.

In this and other ways the case differs from *Fisher's Blend Station, Inc.* v. *State Tax Comm'n, supra,* on which appellants rely. There the exaction was a privilege tax laid upon the occupation of broadcasting, which the Court held was itself interstate communication, comparable to that carried on by the telegraph and the telephone, and was measured by the gross receipts derived from that commerce. If broadcasting could be taxed, so also could reception. *Station WBT, Inc.* v. *Poulnot,* 46 F. (2d) 671.[2] In that event a cumulative tax burden would be imposed on interstate communication such as might ensue if gross receipts from interstate transportation could be taxed. This was the vice of the tax of a percentage of the gross receipts from goods sold by a wholesaler in interstate commerce, held invalid in *Crew Levick Co.* v. *Pennsylvania, supra.* In form and in substance the tax was thought not to be one for the privilege of doing a local business separable from interstate commerce. Cf. *American Manufacturing Co.* v. *St. Louis, supra.* In none of these respects is the present tax objectionable.

Affirmed.

Mr. Justice McReynolds and Mr. Justice Butler are of opinion that the judgment should be reversed.

Mr. Justice Cardozo took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[2] Great Britain levies an annual license tax on radio receiving apparatus. See Wireless Telegraphy Act of 1904, c. 24, 4 Edw. 7, as explained by c. 67, 15 & 16 Geo. 5, and implemented by regulation printed in Great Britain, Post Office Guide, July, 1936.